TERMINATION OF MEMBERSHIP OF INTERNATIONAL ORGANISATIONS

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Termination of Membership of International Organisations

By

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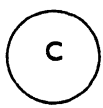

श्रीमातृ चरणेषु

PREFACE

THE origin of this treatise has been the necessity to investigate fully the legitimacy of the claim of New China to representation in the United Nations and its Specialised Agencies. The issue involved has long ceased to be one of fact only, and must now be regarded as a question purely of international law and practice. If, with the duly accepted position of a regular member of an international organisation, China is debarred from sending her representatives to participate in the deliberations of the Organisation, it amounts in actual fact to termination of her membership and this calls for a careful study of the terminative provisions of a constituent instrument. This is all the more essential in view of the growing importance of international organisations in the modern world.

A feature of international co-operation after World War II has been the extraordinary growth and development of international institutions—social, economic, political and even non-governmental in character. It appears that the faith of humanity has come to rest on the effective functioning of appropriate international organisations for the attainment of lasting international peace. There is no doubt that if ever the rule of law is to be established in the international community, it will have to be through the potent agency of international organisations. In the atomic age, with the shrinkage of the globe and the fear of war driving nations closer together than ever before, international organisations have a great role to play in the salvation of mankind. To meet urgent and pressing needs of one kind or the other—military in the case of NATO and economic in the case of the European Coal and Steel Community—considerable advance has been lately noticed in the structure and constitutional form of international organisations which have even been vested, in some respects, with sovereign powers. Having regard to this new development in the field of international co-operation and the hopes that have been raised for the creation of a new world order through this organisational method, the importance of the subject of this study is unquestionable. This

is much more so, because the terminative provisions of a constituent instrument lie at the very root of the stability, permanence and effective functioning of every kind of organisation. In view of the lack of monographs exclusively devoted to this aspect of international organisations, the need for further clarification is pressing. Moreover, the Chinese precedent is pregnant with consequences so far as the future growth and development of international organisations are concerned. It, therefore, needs a careful investigation from the point of view of international law and practice.

However, China and the UN take up only one chapter of this work, since an attempt has been made to examine and analyse at length the various principles of international law applicable to the continuation and termination of membership of international organisations. Thus, while Part Two narrates and examines critically the various provisions for termination specifically prescribed by constituent instruments, Part Three is devoted to the more difficult legal problems which arise when a constituent instrument is silent on the point of termination of membership. In the latter event, a correct approach is of the very essence, as the successful working of international organisations and their real contribution to the well-being of the international community depend to a considerable extent on the application of the correct rules of international law in order to reduce ambiguity and to create a proper understanding and appreciation of basic principles, without which not even a club, let alone the complicated device of international organisations, can function successfully. The main theme has, therefore, been the need for the recognition and application of organisational principles in the light of the rules of international law as a reliable guide to the interpretation of international constituent intruments.

My chief source of information as well as inspiration has been the international constituent instrument itself, which is the basis of all types of international organisations. I could, therefore, do no better than to attach to this treatise, as an Appendix, extracts from the constituent instruments relating to the terminative provisions of important international organisations. This will facilitate easy reference to the relevant articles of the texts of the constitutions of various types of organisations which have not in this form been collected in any single published work.

I am greatly indebted to the former Whewell Professor of International Law at Cambridge, Judge Sir Hersch Lauterpacht, to whom I owe my entire interest in international law, without which this attempt could never have been made. Though his kindness and encouragement have inspired me throughout, I must make it clear that he has left me entirely free to accept or decline his suggestions and he bears no responsibility for any of the views I have put forward or for the statements that I have made.

I am also indebted to Mr. S. Raja Rao, B.COM., for his very competent secretarial assistance most willingly given at all hours and for his help in reading the proofs.

Lastly, I owe an apology to the reader for any defects in style, since English is not my mother tongue. However, I will consider my labour amply rewarded if this brief study will encourage uniformity of approach to problems of international institutions—approach rightly based on organisational principles which will leave no room for doubt or ambiguity on matters of fundamental importance, such as the right of withdrawal in the absence of a specific provision.

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New Delhi,
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ABBREVIATIONS

AJIL	American Journal of International Law.
Annual Digest	Annual Digest of Public International Law Cases (edited by H. Lauterpacht).
Arb. Int.	La Pradelle-Politis: *Recueil des Arbitrages Internationaux.*
ANZUS	Australia, New Zealand and United States Security Treaty.
BYIL	British Year Book of International Law.
EDC	European Defence Community.
FAO	Food and Agriculture Organisation.
ICAO	International Civil Aviation Organisation.
ICJ	International Court of Justice.
ILO	International Labour Office.
IRO	International Refugee Organisation.
ITC	International Telecommunication Convention.
ITU	International Telecommunication Union.
MEDO	Middle East Defence Organisation.
NATO	North Atlantic Treaty Organisation.
PCIJ	Permanent Court of International Justice.
UNESCO	United Nations Educational Scientific and Cultural Organisation.
UN	United Nations Organisation.
UNCIO	United Nations Conference on International Organisation.
UNTS	United Nations Treaty Series.
UNRRA	United Nations Relief and Rehabilitation Administration.
UPU	Universal Postal Union.
WHO	World Health Organisation.
WMO	World Meteorological Organisation.

Part One

INTRODUCTION

Chapter 1

THE GENERAL NATURE OF THE LAW

The Treaty Basis of International Organisations

Treaties and international agreements are not only the origin but also the basis of all international institutions and organisations. If treaties are a recognised important source of international law, they are also the genesis of all international organisations, except those which are non-governmental in character. The latter are given birth to and remain governed by agreements which cannot be technically categorised as treaties, because they are not between two sovereign States, but they, nevertheless, have an international aspect, since they are between bodies or organisations located in different States. The word "treaty" has been defined to denote "a genus which includes the many differently named instruments in which States, or the heads or the governments of States, embody international (including therein inter-governmental) agreements." [1]

Thus, an agreement between two governments is as much a treaty as an agreement between two States, but the same cannot be said of agreements between non-governmental bodies located in different States. Again, from the viewpoint of legal validity, there may not be any difference between an inter-State treaty and an inter-governmental one, but, from the purely organisational point of view, the difference cannot be regarded as one of technical form only. It is fundamental in so far as an international inter-State agreement embraces in its membership the totality of the institutions of its member-States and not merely their executive agencies. If an international organisation is desired to be something more than an association of executive bodies, an inter-State agreement would be preferable to an inter-governmental one.[2] However, not only institutions and organisations established by inter-State agreements, but also those born out of inter-governmental agreements can be legitimately said

[1] McNair, *The Law of Treaties* (1938), p. 3.
[2] Jenks, "Some Constitutional Problems of International Organisations," B.Y.I.L., Vol. 22 (1945), p. 11, at p. 18.

to take their origin from solemn treaties. The same, however, cannot be said of non-governmental institutions which constitute a distinct class by themselves and, therefore, fall outside the scope of this work. As a sovereign independent State constitutes a "perfect international person" and as international law primarily deals with such States, international organisations resulting from treaties between States or their governments remain the main subject of this study.

Again, as States are sovereign, consent is the basis of the law of nations, and treaties which bind participating States to a particular course of action or create international institutions are merely written expressions of that consent. It is a well-established principle of international law that treaties, unlike statutes, bind only those who assent to them, and this aspect was emphasised in the joint dissenting opinion in the *Genocide Reservations* advisory opinion: "consent is the basis of all obligations in international law."[3] It is, therefore, highly significant that it is only by a universally accepted custom or convention that treaties bind parties concerned. Even *pacta sunt servanda* is a mere rule or principle of customary international law. The question which at once arises is, therefore, as to the nature, strength and cementing force of international organisations which come to rest on treaties for their day-to-day working and existence. In short, some international organisations might be subject to Immanuel Kant's objection to international law as "a word without substance (*ein wort ohne sache*) since it depends upon treaties which contain in the very act of their conclusion the reservation of their breach."[4] The right of withdrawal from a treaty or the terms and conditions of termination of membership of an international organisation are problems inextricably interwoven with the nature and character of the treaty—its duration, permanency and stability, rigidity, universality or otherwise, along with a number of other factors which call for careful examination.

Treaties are said to give birth to (i) *universal* international law when almost all the members of the family of nations are parties to it; or, (ii) *general* international law when a majority of States consent to it; or, (iii) *particular* international law when a

[3] Joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo: Advisory Opinion—*I.C.J. Reports 1951*, p. 15, at pp. 31–32.

[4] Phillips, *The Confederation of Europe* (1914), p. 5 (not reproduced in the 2nd edition, 1920).

few States are signatories to it.[5] According to general description rather than serious definition, treaties of the first two types can be said to be law-making or *traités lois* in contradistinction to the third category which concerns two or three States only and partakes of the nature of a contract and is often described as *traités contrats*. It is a well-established fact that this distinction between law-making and contractual treaties is hardly accurate in the strict sense of the terms used, because legislation implies universal applicability, binding even the dissenting or silent minority, which, at best, is very partially, if at all, achieved in the realm of international law. Again, every treaty is basically contractual in so far as it creates contractual obligations between parties irrespective of whether they are two or a hundred, or whether they stipulate a rule of conduct or make an agreement to trade. At the other extreme, it is held by Scelle that practically all treaties are law-making.[6] The extent to which third parties are bound despite the rule *pacta tertiis nec nocent nec prosunt* is examined later, but it is of the utmost significance that treaties when they give birth to international organisations become a class distinct in character when compared to treaties which are purely law-making or contractual. This results mainly from the binding or cementing force of the corpus which they create.

Treaties Establishing International Organisations

Treaties creating international organisations of the type of the League of Nations or the United Nations are often described by jurists as law-making and allowed to rank along with universal agreements of the class of the General Treaty for the Renunciation of War of 1928.[7] However, it is submitted that this particular class of treaty which gives birth to international

[5] Oppenheim, *International Law*, Vol. I (8th ed. by Lauterpacht, 1955), pp. 4, 5 and 27–28. The classification of Universal, General and Particular International Law is Oppenheim's. However, the linking of these categories to law-making and contractual treaties is entirely mine. It is necessary to state here that these rubrics denote general tendencies and cannot be regarded as terms of precision.

[6] Scelle, *La théorie Juridique de la revision des traités* (1936), p. 41.

[7] Brierly, in *The Law of Nations* (4th ed. 1950), p. 59, describing a law-making treaty states that they "are those which a large number have concluded for the purpose either of declaring their understanding of what the law is on a particular subject, or of laying down a new general rule for future conduct, or of *creating some international institution* like the UN." Oppenheim, *op. cit.*, Vol. I, p. 28 (footnote); "Most important of all law-making treaties is the Charter of the UN."

organisations and forms the subject of this study works on a different footing and has a different force from that seen in purely law-making treaties, such as the Hague Conventions or the Geneva Conventions of 1949.[8] For example, in contradistinction to municipal law, there is no sanction in customary international law for due observance of a purely law-making treaty, except the rarely exercised sanction of resort to war in the event of its violation. However, in the case of treaties creating international organisations like the UN, a mechanism of sanctions, though weak and difficult to enforce, does exist in addition to war or in the form of at least an international declaration condemning the act of the treaty-breaker. Such a machinery is conspicuously absent in *traités lois*, which do not create international organisations.

Again, as treaties giving birth to organisations more often than not establish an executive agency, employ personnel and build a structure with its own limbs, their binding or cementing force is bound to be of a different order, and governed by different principles, when compared with a treaty which prescribes a course of action or lays down a mode of conduct with no special machinery to enforce it. For example, the binding force of the North Atlantic Treaty is of a different order from that of the ratified Hague Conventions on the Laws of War. Thus, treaties establishing international organisations, apart from having the same sanctity as any other law-making treaty, give birth to a "corporate personality" which is often vested with legal powers to sue and be sued in turn. Such a treaty has a twofold aspect, namely, first, it is a multipartite contract containing a number of obligations between States, and, secondly, which is its distinguishing characteristic, it also embodies the written constitution of the organisation giving birth to the existence of a corpus which, in turn, is empowered to take action or to make rules in certain circumstances. These when ratified create further binding contractual obligations. Thus, such treaties create twofold obligations and in two different ways—directly by means of a specific undertaking given by each contracting party, or

[8] Misc. No. 4 (1950) Cmd. 8033. "It is necessary to distinguish between the species of law-making treaty which establishes an international organisation, and that which merely legislates in the sense of stipulating rules of international conduct."

indirectly by the organisation itself, which is empowered to function according to its constitution. The result is highly significant as, for example, the corporate and juridical personality of the UN is of such an order that jurists have found reason to recognise that world organisation as an " international person *sui generis*." However, the Hague Conventions, or the Pact of Paris of 1928, create no such international personality.

This aspect of treaties which establish international organisations is all-important when we come to the detailed legal analysis of the right of a particular member to withdraw or be temporarily removed or expelled from participating in such a treaty. Against this background, it is easier to understand why withdrawal from, or termination of, membership of an international organisation should be subject to principles different from those which govern denunciation of a purely law-making treaty. For example, in the latter, the right of abrogation accrues to one party from violation by another party. Even " in the opinion and practice of the United Kingdom Government such a right exists," [9] but it is of great significance that abrogation has no application to treaties creating international organisations. It may apply to treaties in general, but not to an international constituent instrument. For example, if one member of the Council of Europe, or the UN or any of its Specialised Agencies were to violate the terms of the treaty or the Charter, the other signatories would hardly acquire a right to terminate the international organisation.

In the circumstances, though Oppenheim [10] recognises only two broad classes of treaties, it is clearly necessary to recognise a third category comprising instruments constituting international organisations.

Constitutional Position Relating to Withdrawal

The difficulty of withdrawal or removal from an institution in which has been pooled even the fractional or notional sovereignty of the participant States is easily understood, because the one underlying principle of all composite forms of organisations, whether national or international, is that the stronger the central core—and hence the greater the limitation of national sovereignty

[9] McNair, *The Law of Treaties* (1938), p. 492.
[10] Oppenheim, *op. cit.*, pp. 878–879.

—the weaker is the right of secession. Every international organisation is more or less composite in character, inasmuch as treaties creating international organisations essentially establish a compound power of the full sovereign member-States, which power more often than not, for some purposes at least, becomes an "International Person." This composite aspect of international organisations bears a distinct resemblance to composite national constitutional organisations which may be federal or confederal in character. Since the right of withdrawal or unilateral expulsion of an associating unit arises in composite structures, both national and international, a comparative analysis of the two spheres is most illuminating. The nature and type of composite organisation or association depends upon the infinite variety of relationships that may be made to exist between the central core and regional units, depending on whether there is between them co-ordination, superordination, graduated subordination, easy or difficult withdrawal, or no withdrawal at all and partial or complete partnership. It will be necessary for the purpose of appreciating the organisational principle which governs the right of withdrawal and expulsion in international institutions to enter upon a detailed examination of federal and confederal organisations which represent the two fundamental relationships between the centre and associating States.

(1) Confederation

A confederation, or *Staatenbund*, is a half-way house between a mere League of States and a complete federation, or *Bundesstaat*. The best illustration of a confederation is furnished by the Union of Utrecht (1579) which brought into existence the historic Confederation of the Netherlands which lasted until 1795. This was a loose association of five sovereign States, which Motley has very appropriately described, while bringing out the fundamental principles governing such composite States, as "merely a confederacy of sovereignties, not a representative republic. Its foundation was a compact, not a constitution . . . The General Assembly was a collection of diplomatic envoys bound by instructions from independent States. The voting was not by heads, but by States. The deputies were not representatives of the people,

but of the States."[11] The fact that the deputies of the confederating States were representatives of their governments, liable to be withdrawn at any time, illustrates the fundamental doctrine of subordination of the central confederal structure to the regional governments. This is the distinguishing characteristic of a confederation and the inevitable corollary of this subordination is the right of each member-State to withdraw unilaterally from the confederation. The confederal structure which was set up in the United States by the Articles of Confederation of 1777 has been described as "essentially a League of Nations."[12] The powers of the central organ were merely requisitory as each State was free to respond or refuse at pleasure.

A study of the German Confederation, which lasted from 1815 to 1866, also helps to illustrate the fundamental difference between a *Staatenbund* (confederation) and a *Bundesstaat* (federation).[13] The former has been described as a system destructible by the assent of the individual members, whereas in a federation such destruction is regarded as impossible. In a confederation, therefore, there could be no question of the central organ gathering power and strength with the passage of time, because it was impossible for the centripetal tendencies called the *kompetenz-kompetenz* to develop, since there was the possibility of complete obstruction resulting from the exit of a dissatisfied member. The fundamental right of withdrawal at will in a confederation, which is well established both in political practice and in constitutional law, is based upon the principle that, in such an arrangement, States are sovereign, retaining their full international personality, and the confederal organs are strictly their delegates. It could probably be inferred, therefore, that the right of withdrawal is inherent in the attribute of sovereignty of a State and can be exercised at will if not expressly limited by a stipulation in a treaty. This is the basic organisational principle which must govern the problem of withdrawal from international organisations also.

[11] Sir J. A. R. Marriott, *Federalism and the Problem of the Small State* (1943), p. 80; and Motley, *Rise of the Dutch Republic*, Vol. iii, pp. 415–416. See also the edition of the Ballantyne Press, 1883, in one volume, p. 792.
[12] Woodward, *A New American History* (1947), p. 185.
[13] Marriott, *ibid.*, p. 79.

(2) Federation

A federation, or *Bundesstaat*, is a higher form of composite State, in which the sovereign federating States lose their international personality. Again, they lose their sovereignty to the extent to which they agree to pool the same to create the central federal mechanism. Federations are often classified as having either centrifugal tendencies, as in the United States and Australia, when the residuary jurisdiction is vested with the regional governments, or centripetal tendencies, as in Canada and India, where the residuary jurisdiction is vested with the centre. As long as the central and the regional governments are sovereign in their respective specified spheres, and the constitution is a written sacred document, the political structure is essentially federal and the right of secession is denied to both. The governing principle on the subject may be said to be enunciated by Chase C.J. in the celebrated case of *Texas* v. *White* (1868) where he held that "the Constitution (1787) in all its provisions, looks to an indestructible union, composed of indestructible States."[14] This case was followed by the American Supreme Court in *Knox* v. *Lee*.[15] Apart from these legal pronouncements, Lincoln made it clear that "physically speaking, we cannot separate. We cannot remove our respective sections from each other."[16] Thus, in a federation where the sovereignty of the federating States is limited to such an extent that they lose their international personality, which must be said to have been merged in the central federal core, which alone represents the entire number of federating States in all external affairs, the constitutional structure of the composite State becomes so closely woven that the right of unilateral withdrawal or expulsion ceases to exist. The report of the Joint Committee on the petition of the State of Western Australia in 1935[17] clearly illustrated the principle that there was no right in a regional government acting alone to leave a federation, or for the central government alone to expel a member government. When the state of Western Australia petitioned the

[14] Chase C.J. in *Texas* v. *White* (1868) 7 Wallace 700, at p. 725.
[15] (1870) 12 Wallace 457; 79 U.S. 287 *sub nomine* "Legal Tender Cases"; see especially the separate opinion of Mr. Justice Bradley, 79 U.S. 313.
[16] Annual Message to Congress, December, 1, 1862; *Abraham Lincoln, His Speeches and Writings*, edited by Roy P. Basler (1946).
[17] British Parliamentary Papers, Session 1934–1935, Vol. 6, p. 135. H.L. 52, 75, H.C. 88, 1935.

United Kingdom Parliament seeking a special enactment for its secession from the Commonwealth of Australia, the Select Committee of Lords and Commons came to the conclusion that the Parliament at Westminster could not deal with such a matter upon the mere application of a single federating state of Australia. It was felt that a request from the federal government would have been more authoritative. This clearly illustrates that in both law and practice there is no right of secession vested in any federating State acting unilaterally. In the Swiss [18] and United States [19] Constitutions, no state can secede or be expelled without undergoing the normal procedure for constitutional amendment. It is a well-established principle that an amendment of a written federal constitution, which is always rigid, requires the concurrence of a certain fixed majority of the legislatures of the federal units. This indicates that the consent of the erstwhile sovereign federating units is essential before one of them can secede from the central federal structure. Thus, in the Constitution of the United States a state's consent would be necessary for any withdrawal in view of Article 5 of the Constitution which provides that " No State, without its consent, shall be deprived of its equal suffrage in the Senate." [20] Thus, with the exception of the Soviet Union [21] which may, in theory, be said to have a quasi-federal constitution, there is no provision for unilateral secession or expulsion in modern federal political structures. Even in Soviet Russia though Article 17 [22] gives " to every Union Republic the right freely to secede from the USSR," it is quite clear that the exercise of this right is never likely to be permitted.

It is clear from the above analysis that a distinct connection exists between the strength of the organisational centre and the right of withdrawal from it. The logic behind this connection is easy to appreciate and has been stated before. The stronger the central core of the institution, the more closely woven is its organisational pattern and the greater are the centripetal tendencies allowing little or no room for its participating members to escape. The weaker the centre, the looser is the pattern of its

[18] Constitution of 1848; Peaslee, *Constitutions of the Nations* (1950), Vol. 3, p. 122.
[19] *Ibid.*, Vol. 3, p. 362.
[20] *Ibid.*, p. 368.
[21] *Ibid.*, p. 267.
[22] *Ibid.*, p. 269.

administrative organs and the greater the possibility of escape by way of removal or withdrawal. Thus, in contrast to the loose-knit personal union or a league where unilateral withdrawal is possible, in the federal or unitary States there is no such thing as a right of secession. Again, if international organisations alone are examined, a similar observance of this principle will be noticed. For example, withdrawal from the League of Nations which was a mere association of States was easier under Article 1 (3) of the Covenant than under Article 13 of the North Atlantic Treaty which bars withdrawal for a period of twenty years. [23]

International Organisations and Federations

Again, the resemblance of international institutions to federal types is so marked that a comparative analysis is illuminating. To start with, both are based on a written document—the sacred written constitution of the federation or the solemn treaty of the international organisation. In fact, even the written constitution of a federation is described as a treaty between the federating states. Again, both have a central core—the central government of the federal state or the corpus of the international organisation —and they both entail an infringement on the sovereignty either of the federating units or the independent national States. Moreover, though the existence of a federal centre acts as an infringement on the sovereignty of the federating units, it is the basic advantages resulting from unity which dictate federation, despite conflicting interests in some spheres, exactly in the same manner as independent nations driven by necessity to adopt a common course of action in administrative, political and economic spheres, are compelled to create appropriate international institutions. Thus, fundamentally, the reasons leading to the birth of a federation are more or less the same as those which lead to the establishment of an international organisation. However, the rigid central federal structure creates a central State within states—an *imperium* in *imperio*—which represents a stage of government not yet attained by the international community. The League of Nations was neither a " super " nor a " supra " State, but a mere

[23] See Beckett, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations* (1950), p. 68; and Goodhart, " The North Atlantic Treaty," *Hague Recueil* 1951 (II), p. 225, comparing the Charter of the U.N.

recommendatory association of sovereign member-States working on a co-operative basis. The UN Charter has gone a step further in creating a nucleus or a central core empowered to act on its own, and has thus provided an organic basis however weak and ineffective it may be. An advance has been registered, but international organisations still do not come anywhere near a federal type.

Are the UN and the League Confederations?

Dr. Schwarzenberger has described both the League of Nations and the United Nations as "typical confederations as distinct from federations."[24] However, a detailed investigation would reveal that this is only partially true. Some of the marked affinities between a confederal structure and an international organisation of the type of the League of Nations have already been described and they need not be repeated here. However, the UN Charter departs from the confederal principle when it empowers the General Assembly to expel a member from the Organisation by a two-thirds majority upon the recommendation of the Security Council; *vide* Article 6 of the Charter. In a confederation where the central structure is dependent upon the regional governments, there can be no question of the expulsion of the latter by the former. Similarly, in the Covenant of the League of Nations there is also a right of expulsion under Article 16 (4), but it is subject to a unanimous verdict of the Council which is not necessarily under the UN Charter. As decisions of the Security Council in such matters would require an affirmative vote of seven members, including the concurring votes of the permanent members, it is possible in the UN Organisation for expulsion to take place even though four non-permanent members of the Security Council vote against expulsion. Thus, the UN Charter which, according to Brierly, creates corporate organs with capacity to act, is distinctly a higher form of composite international organisation than the League of Nations.[25] However, as both are endowed with the power of expulsion, they differ from a confederation since the central organ of the latter is not invested with any such right. It would not, therefore, be accurate either

[24] Schwarzenberger, *International Law* (1949), p. 520.
[25] Brierly, *The Law of Nations* (4th ed. 1950), p. 104.

to bracket the League of Nations with the United Nations, or to describe both as "typical confederations."

Again, another marked contrast between a confederation and an international organisation of the type of the League of Nations or UN is that, whereas such organisations have an international personality, which may be regarded as *sui generis*, the union of confederated states is not an international person.[26] In these two important respects both the League of Nations and the UN describe both as "typical confederations."

The Basic Structural Principle

However, as the growth of international organisations has been haphazard, if would be incorrect to draw conclusions relating to the compactness or otherwise of an international organisation by the mere observance of a certain principle in its structure. It is necessary, therefore, to go to the root of the matter with a view to ascertaining what basic considerations go to determine the texture of the structure on which depend the conditions of withdrawal. It is often stated that the one cardinal distinction between a confederal structure and a federation is that, whereas in the central organs of the former the delegates represent the governments of the States, in the latter it is only the representatives of the people, chosen by a method of direct election, who can represent the associating or federating States. On that assumption it can be argued that a step towards a more permanent and compact form of international organisation was taken when in the ILO [27] each government was required to nominate four persons of whom two were to be the delegates of the government and the other two representative of the employers and the workers respectively. Though the latter two were to be chosen by the government of the respective member-States in consultation with the most representative industrial organisations, it could, nevertheless, be asserted that the General Conference was not a mere diplomatic assembly, since its composition had become partly

[26] Oppenheim, *op. cit.*, Vol. I, p. 171: "A union of so-called confederated States is not an international person."

[27] Constitution of the International Labour Organisation (as amended by the "Constitution of the International Labour Organisation Instrument of Amendment") Article III (1), International Labour Office, Geneva, 1950 Conference Edition. Constitution of the ILO Instrument of Amendment, 1953, International Labour Office, Geneva, 1953.

diplomatic and partly representative of the people on an occupational basis. However, as the central organisation was not empowered to take decisions which would be *ipso facto* binding upon the member-States, this distinctive feature of the composition of the International Labour Organisation, though noteworthy, could not be regarded as leading to any more compactness in the organisational structure.

In the past there have been cases of different methods of representation of member-States in the central organ of an international institution. For example, in the case of the Central American Court of Justice established under a Convention of 1907 [28] comprising five judges, it was agreed that one of them was to be appointed by the legislative power of each of the Central American States creating the court. This illustrates the principle that the mere nature of representation, whether nomination by the executive or election by the legislature of the member-States, has little direct bearing on the strength and compactness of the central organs of an international institution on which depend the conditions of withdrawal. The basic fact which leads to compactness is the extent of the powers conferred on the central core by the associating States, which have *ipso facto* to lose a portion of their sovereignty. There is, however, no doubt that the method of direct representation considerably helps in firmly establishing the organisation, which no longer remains dependent upon the wish or the political complexion of the governments of the member-States. In this respect the European Coal and Steel Community [29] has indeed registered a marked progress. The Assembly, which is one of the organs of the Community, is elected by direct universal suffrage, or, indirectly, by the parliaments of the member-States in certain fixed quota, *e.g.*, Italy, Germany, France—18, Belgium and Netherlands—10, and Luxemburg—4. The European Defence Community,[30] which was not ratified by all concerned, visualised a People's Chamber elected by universal suffrage, with France sending 70 members, Italy 63, Germany 63,

[28] Article 6. For text see Appendix " B " in Hudson, *The Permanent Court of International Justice, 1925*. For further references and full discussions, see Hudson, *The Permanent Court of International Justice, 1920–1942* (1943), pp. 42 *et seq.*

[29] For text of the Treaty of April 18, 1951, setting up the Community, see A.J.I.L. 1952. Supplement, p. 104.

[30] See Cmd. 9127 (1954). The Treaty could not come into force unless ratified by all the signatories: see Article 132.

Belgium 30, the Netherlands 30 and Luxemburg 12. Similarly, it visualised a Senate elected by the national parliaments of France, Italy and Germany sending 21 representatives each, Belgium and the Netherlands 10 each. It also visualised a Council of Ministers and the central machinery was to be in the hands of the treaty-making Powers. The extent of sovereignty surrendered to the European Defence Community would have been sufficient to make it a sovereign body itself. An organisation of this type would certainly have been federal in character, making unilateral denunciation during the life of the Treaty as much constitutionally objectionable, and hence prohibited, as in a federation.[31]

Thus, the conclusion so far drawn is that conditions of withdrawal ostensibly depend upon the structure of the organisation, whether compact or loose, but the fundamental principle governing withdrawal ultimately resides in the extent of sovereignty agreed to be pooled by the associating States in creating the central organs of the confederation or the international organisation. However, if mere manifestations or illustrations of the extent of sovereignty pooled are mistakenly held to be fundamental distinguishing criteria of compactness or otherwise, it is possible to arrive at false conclusions. For example, the principle of representation of member-States, based on their government delegates, as against direct election by the people, is a symptom, but not the sole test, of the extent of sovereignty surrendered to create the international organisation. However, the nature of representation by itself is no sure indication of the compactness of the structure in relation to withdrawal. Similarly an international organisation may have juridical personality, but no sovereignty, whereas in a federation the Central Government has sovereignty also. Compactness, however, depends upon the extent of sovereignty pooled. Thus, the mere fact of juridical personality cannot in itself be a criterion determining the nature of the texture of that organisation in relation to conditions of withdrawal. It is, therefore, essential to repeat and emphasise that it is the quantum of sovereignty surrendered which matters in determining whether the organisation created has a compact or loose structure making for no withdrawal or difficult or easy withdrawal.

[31] See Article 128 of the proposed draft of the European Defence Community which prescribed a life of 50 years for the Treaty.

The reason is not far to seek, as the greater the quantum of sovereignty pooled, the greater is the commitment of the associating States and the higher the responsibility of the central institution, which must have organs of appropriate strength and compactness to perform the functions assigned to it. Thus, when States are heavily and firmly committed, which is inevitable when a distinct portion of sovereignty is surrendered, withdrawal from such commitment must be, *ipso facto*, difficult.

The General Nature of Expulsion

However, the same cannot be said of the power to expel, which has to be specifically assigned to the central organisation. It is essential, however, to remember that once the associating States agree to pool a certain extent of their sovereignty, they are equally keen to see that the central core does not become so strong as to override their existence. Expulsion is, therefore, a unique institution found only in those composite structures, particularly international, where the central organisation has not developed the technique of creating appropriate judicial organs with a view to penalising or removing the persistent violator of the fundamental principles of the organisation. Such violations could possibly be dealt with by this method before resorting to military or economic sanctions, though it is doubtful if expulsion would be effective in that context. However, when preventive or enforcement action has been taken, expulsion or suspension of membership *ipso facto* follows, and Articles 5, 6 and 19 of the UN Charter furnish a clear illustration of this position. Expulsion is, therefore, essentially provided as a safeguard against the obstinate defaulter who refuses to leave the organisation after violating its principles. However, when a judicial institution is created by the comprehensive charter of an international organisation like the European Coal and Steel Community or the European Defence Community, all disputes and doubtful acts of the member-States are subjected to the judicial scrutiny of a court competent to give and enforce its awards, and in such a composite organisation the right of expulsion disappears. Thus, according to Article 12 of the European Coal and Steel Community, the terms of office of a member of the High Authority could be terminated by death or resignation. Again, if a member no longer fulfilled the conditions necessary to the exercise of his functions, or committed a gross fault,

he could be removed from office by the Court on petition by the High Authority. The reference to a Court of Justice, which is one of the four established institutions of the Community, is indeed significant because, with its presence, the necessity for an expulsion clause disappears. Thus, this particular institution of expulsion, which furnishes one of the methods of terminating membership, is to be found in the intermediate class of composite structures. It is absent in the loose type of structures such as confederations, where the central institution, being dependent upon the regional associating States, has no right to expel the latter. Similarly, it is also conspicuous by its absence in more compact types where the central organisation partakes of some of the sovereign attributes in its own sphere, as in the European Coal and Steel Community or the European Defence Community, where no provision for expulsion would have existed. Thus, international organisations which come between the more loose and the more compact structural forms and may conveniently be described as belonging to the intermediate group, like the League of Nations or the UN, have a specific provision for expulsion.

As a detailed examination of the legal position relating to withdrawal and expulsion in each type of international organisation is made in the subsequent chapters, the main intention of this introductory sketch has been to examine the general structural principles which govern the operation of these two methods of termination of membership in composite types of organisations.

In the light of what has been stated above, the importance of the subject under study is immense. In actual practice it is essential for each State to know the extent to which its sovereignty and its right of withdrawal from an international organisation are limited or curtailed when it ratifies a constituent instrument. Withdrawal of a member-State is quite a common feature in some of the Specialised Agencies of UN and the law governing this practice is of some consequence in international relations. Apart from the practical importance of this subject, it has considerable theoretical importance, for a detailed study of the right of withdrawal or expulsion involves the application of some of the fundamental principles of international law, and

thereby throws light on the nature and strength of such principles when operating in this particular sphere. For example, the inherent right of withdrawal where no specific provision exists in a treaty is said to be based on the principles of sovereign independence of States and, therefore, the juridical aspects of this problem are of the highest importance from the point of view of international jurisprudence.

Part Two

WHERE CONSTITUTIONAL PROVISION IS MADE

THE well-known maxim of construction *expressio unius est exclusio alterius* leaves no room for doubt that any specific provision in a treaty prescribing a method or machinery for its termination, or, if it sets up an organisation, the termination of membership of any of its member-States, would completely exclude any implied condition or any inherent power to denounce and withdraw from it. A right existing in customary international law would not warrant a withdrawal or expulsion if contrary to an express stipulation, because consent alone is the basis of all binding obligations in international law, and if a sovereign State has consented to a certain procedure or agreed to a definite commitment, it is subject to an overriding obligation. It is a well-established principle of legal procedure observed as much in municipal as in international law, that " when power is given to do a certain thing in a certain way, it must be done in the way prescribed or not at all." Any other way would contradict a specific stipulation and would, therefore, be illegal. This procedural dictum was laid down by the Privy Council in *Nazir Ahmed* v. *K. E.*[1] Although it is a municipal decision, the soundness of the general procedural jurisprudence on which the *ratio decidendi* of the case is based makes it applicable with full force to all procedural matters in the field of international law and organisation. International practice has supported this dictum. Thus, Sir John Simon, as Secretary of State for Foreign Affairs, speaking in the House of Commons on November 7, 1933, on the Locarno Treaty of Mutual Guarantee, observed, " the Treaty . . . cannot be denounced by us or by any other signatory by way of a unilateral act. It can be terminated only in the circumstances stated in Article 8 of the Treaty " (by action on the part of the Council of the League).[2] American jurists have favoured

[1] 1936 40 C.W.N. 1221 (P.C.) or see 38 Bombay Law Reporter 987 (P.C.) L.R. Indian Appeals, Vol. 63, p. 372.
[2] Hansard, Commons, 5th Series, Vol. cclxxxi, col. 61.

this view; the Harvard Research has stated this accepted principle of international law as follows: "A denunciation must be in accordance with any condition laid down in the treaty or agreed upon by the parties." [3] In addition, there are also the dissenting opinions expressed by Judges Van Eysinga and Schücking in the *Oscar Chinn* case before the Permanent Court of International Justice in 1934. The Court had to examine the General Act of Berlin, 1885, which had expressly provided that it could be modified by consent of all contracting parties and hence the learned judges applying the argument, *a contrario*, were of the opinion that the collective revision clause of the General Act precluded changes of the Act by some of the parties *inter se*. Thus, an amendment carried out by some of the parties was "contrary, not only to an essential principle of international law but also to Article 36 of the General Act of Berlin, which expressly provides that modifications may only be made in the General Act by agreement, and hence a legal situation of such importance had arisen that a tribunal should reckon with it *ex officio*." [4]

It is essential to enumerate the typical provisions of termination of membership which are found in international constituent instruments. They may briefly be categorised as follows:

(1) Withdrawal.
(2) Suspension of the privileges of membership.
(3) Expulsion.
(4) Loss of membership on account of non-ratification of an amendment to the constitution of the organisation.

A detailed examination of each of the above methods is attempted in the chapters that follow.

[3] Article 34 Draft Convention of the Law of Treaties, Supplement to Vol. 29 (1935) of the A.J.I.L., p. 664.

[4] See *Oscar Chinn* case: P.C.I.J., Series A/B 63, p. 65, at p. 135; 3 Hudson, *World Court Reports*, p. 418, at p. 470. Contrast the view of the majority, *ibid.*, at pp. 80–81 (Hudson, p. 432), but it seems that they were much influenced by the pleadings.

Chapter 2

WITHDRAWAL

Withdrawal is the most well-known device resorted to by States for terminating their membership of international organisations and no fewer than ten of the Specialised Agencies of UN have a withdrawal clause.

They are:

International Labour Organisation	Article	1 (5) [1]
Food and Agricultural Organisation	,,	XVIII [2]
International Telecommunications Union	,,	20 [3]
Universal Postal Union	,,	10 [4]
International Civil Aviation Organisation	,,	95 [5]
World Meteorological Organisation	,,	80 [6]
International Bank for Reconstruction and Development	,,	VI(1) [7]
International Monetary Fund	,,	XV(1) [8]
International Refugee Organisation	,,	4(10) [9]
UNESCO	,,	2(6) [10]

In addition to withdrawal clauses some also have a provision for suspension and/or expulsion. For example, the World

[1] See Chap. 1, Part 1 and Appendix.

[2] See B.Y.I.L. 23 (1946), p. 421; Treaty Series No. 4 (1946) Cmd. 6595; A.J.I.L., Vol. 40 (1946) Suppl., p. 82. The Article has been changed by amendment: see Constitution Rules and Regulations published by the FAO 1952 and Appendix.

[3] See Appendix. International Telecommunications Union, *Documents of the Plenipotentiary Conference 1952*, Geneva, 1953; *Text of the Convention 1952*, published by the Union 1953. For membership problems, see Codding, *ITU* (1952), pp. 413 *et seq.*

[4] See Appendix. Text of 1952 Revision published by the Universal Postal Union.

[5] Treaty Series No. 8 (1953) Cmd. 8742. See Appendix.

[6] Treaty Series No. 36 (1950) Cmd. 7989; B.Y.I.L. 26 (1949), p. 504. See Appendix.

[7] Treaty Series No. 21 (1946) Cmd. 6885; B.Y.I.L. 24 (1947), p. 472; UNTS 2, p. 134. See Appendix.

[8] Treaty Series No. 21 (1946) Cmd. 6885; B.Y.I.L. 23 (1946), p. 448; UNTS 2, p. 39; Sohn, *Cases and Materials on World Law* (1950), p. 1216. See Appendix.

[9] Treaty Series No. 25 (1950) Cmd. 7933.

[10] See Appendix.

Meteorological Organisation has a withdrawal clause (Article 30) and a suspension clause (Article 31), but no provision for expulsion. The ICAO has a provision for suspension of the privileges of membership for default (Articles 62 and 88) along with a withdrawal clause (Article 95). However, the first four Specialised Agencies mentioned above have withdrawal clauses only, and the organisations are not empowered to suspend or expel their member-States.[11] On the other hand, the International Bank and the International Monetary Fund have provisions for withdrawal, suspension and expulsion.[12] Apart from the Specialised Agencies, several other constituent instruments like the Bogotá Charter of the Organisation of American States [13] and the ANZUS Treaty (1952) [14] have a provision for withdrawal even though the treaty is declared perpetual. Apart from international constituent instruments, even an ordinary treaty of mutual defence assistance like that signed between the Government of the United States and the Government of the Republic of Korea on January 26, 1950, provides for termination by written notice to take effect three months after receipt of the same by either party.[15]

Though the Covenant of the League of Nations had also a withdrawal clause, *vide* Article 1 (3),[16] it is highly significant that such a provision should be conspicuous by its absence in the United Nations Charter as well as in one of its Specialised Agencies, *i.e.*, the WHO,[17] and until recently the UNESCO.[18] The

[11] ILO Article 1 (5). FAO Art. XVIII. ITU Art. XX, UPU Art. X.

[12]

International Bank Agreement	1. Withdrawal	*vide*	Article	VI (1)
	2. Suspension	,,	,,	VI (2)
	3. Expulsion	,,	,,	VI (2)
International Monetary Fund Agreement	1 Withdrawal	,,	,,	XV (1)
	2. Suspension	,,	,,	XV (2)
	3. Expulsion	,,	,,	XV (2) (b)

[13] Article 112: Treaty signed April 30, 1948: in force December 13, 1951. For text see A.J.I.L. 46 (1952), Suppl., pp. 43 and 63. See Appendix.

[14] Treaty signed September 1, 1951, in force April 24, 1952. A.J.I.L. 46, Suppl., pp. 93, 95. See Appendix.

[15] See Article 8 of the Treaty, in force on the same date. A.J.I.L. 45 (1951), Suppl. p. 73.

[16] See Appendix.

[17] For Constitution see UNTS 14, p. 186; B.Y.I.L. 24 (1947), p. 451; Treaty Series No. 43 (1948) Cmd. 7458; *Handbook of Basic Documents*, 6th ed., S.H.O., Geneva, 1953.

[18] UNTS 4, p. 275; Treaty Series No. 50 (1946) Cmd. 6963; B.Y.I.L. 23 (1946) p. 416; Sohn, *op. cit.*, p. 1291; Constitution UNESCO publication, Paris 1953.

legal position relating to withdrawal in the absence of a withdrawal clause is examined in the subsequent chapter. It is intended to examine here the details of the various types of withdrawal clauses stipulated in constituent instruments.

If the withdrawal clauses of constituent instruments are compared, the following four elements will be found, of which the first at least is always present:

(i) A written notice.

(ii) An initial period of prohibition during which no notice can be given.

(iii) A minimum period of notice, which may be called the "cooling-off period," before withdrawal can become effective.

(iv) The fulfilment of outstanding obligations before withdrawal takes place. In a majority of cases this refers to financial obligations to the organisation and is often called the "financial stipulation." However, in some constituent instruments like the Covenant of the League of Nations, "outstanding obligations" include international obligations as well as obligations under the Covenant.[19]

In some of the withdrawal clauses all the above four elements are present, but their existence in entirety is not essential. However, a notice is an essential constituent of withdrawal and may be regarded as a *sine qua non* although there may be neither an initial period of prohibition nor the "cooling-off period" for the notice to be effective. This is clearly illustrated by the Articles of Agreement of the International Monetary Fund and the International Bank where all that is necessary for withdrawal is the serving of a written notice.[20] On the other hand, a typical example of the presence of all four elements is furnished by Article XVIII of the FAO, where it is provided that any member "may give notice of withdrawal at any time after the expiration of four years from the date of its acceptance of the Constitution." Apart from this initial prohibitory period of four years when no notice can be served, there is a further provision that a notice

[19] See Article 1(3) of the Covenant of the League of Nations.

[20] See Article VI (1) of the International Bank Agreement and Article XV (1) of the International Monetary Fund Agreement.

will take effect one year after the date of its communication to the Director-General of the Organisation. This is the " cooling-off period " referred to in (iii) above.

Written Notice

As has already been stated, a written notice is the barest essential of a withdrawal clause. It has also been mentioned that the International Bank and the Monetary Fund stipulate that " Withdrawal shall become effective on the date such notice is received." [21] It appears that financially the position of vantage which both these organisations enjoy in relation to their member-States rules out the necessity of either the initial prohibitory period or the " cooling-off period." These two monetary organisations are empowered by their Articles of Agreement to deduct any amounts due to them, including charges accrued after the date of withdrawal, when repaying the quota of the amount due to the withdrawing member. The International Bank has even the power to withhold any amount due to a former member so long as the government remains liable as borrower to the Bank, *vide* Article 6, Section 4 (C) (1) of its Constitution. Thus the nature of the organisation and the special provisions of the constituent instrument do not require anything more than the serving of a written notice for withdrawal. It is the basic advantage of membership which keeps the member-States associated with the organisation and does not permit them to walk out at will.

Another illustration of a withdrawal clause with the stipulation of a written notice only is furnished by the British reservation to the acceptance of the jurisdiction of the International Court under the " Optional Clause " to Article 36 of the Statute of the Court. The reservation limits the period of acceptance of jurisdiction " until such time as notice is given to " terminate the acceptance. It is significant that the period of notice is not specified. In this particular case, political reasons have prevented States from stipulating a notice period. Thus the jurisdiction of the International Court can be terminated at any time by the mere serving of a notice. Hence " written notice " as the sole constituent of a withdrawal clause is a curious example of diametrically opposite reasons producing the same results. For

[21] Article 6, Section (1) of the International Bank Agreement.

example, the same result can be produced either because the member-States being too apprehensive of any limitation to their sovereignty in a particular sphere may find it necessary, for strong political reasons, not to enter into any permanent commitment and hence stipulate the short-cut procedure of a notice only, or the organisation may be in such a strong position, because of the inherent advantages which it confers on member-States, that a written notice can only be considered an adequate safeguard, both financial and administrative, for the effective continuance of the Organisation. However, as the *raison d'être* of a withdrawal clause in a constituent instrument is to limit or restrict the inherent right of withdrawal of a member-State, it is usual to stipulate other conditions also, such as the initial prohibitory period or the "cooling-off period." The legal position relating to withdrawal of a member-State in the absence of a withdrawal clause has been discussed at length in a subsequent chapter.[22] Though the point is controversial, it is submitted that the normal withdrawal clause is not stipulated with a view to conferring the right of withdrawal on a member-State, which it already enjoys on account of its sovereignty and the principle of residuary jurisdiction, but it is with the sole purpose of restricting or limiting the inherent right of withdrawal that such a provision has to be made. If that is accepted as the correct constitutional position, the sole condition of written notice is indeed a very minor restriction of that inherent right, and if the constituent instrument goes so far as expressly to incorporate a withdrawal clause, it usually subjects withdrawal to more conditions than one. However, a withdrawal clause stipulating notice alone as a condition of withdrawal is not merely a provision *ex abundanti cautela* since organisations such as the Bank and the Monetary Fund require a written notice for the purpose of taking appropriate action regarding settlement of accounts, which is only possible under the constituent instrument when the notice is received. Though the nature and functions of an international organisation may justify or demand in some cases a withdrawal clause which provides only for written notice, it is unusual for such clauses to be confined to this single minimum condition.

[22] Chap. 6.

Initial Prohibitory Period

In regard to the initial prohibitory period, it is significant that universal or global international organisations like the League of Nations or the United Nations and several of its Specialised Agencies do not have a provision prohibiting any kind of withdrawal for a certain initial period, when the organisation has come into existence and may need every assistance of its members to establish itself. It is significant that the provision for a prohibitory period has nowhere been found to exist as a separate independent article of a constituant instrument. Not only in UN but also in WHO, where powers of expulsion and suspension exist but no withdrawal is stipulated, there is no prohibitory period. It might appear that a prohibitory stipulation can only be complementary to a withdrawal clause: but, though this is certainly the practice, it cannot be regarded as a legal necessity. If one accepts the inherent right of withdrawal, it may become necessary to make an express stipulation against the exercise of that right and hence a specific provision may be necessary and justified. In the circumstances, a separate independent article prohibiting withdrawal for a certain stipulated period, though no withdrawal clause exists in the constituent instrument, would not be otiose.

However, even when there is express provision for withdrawal in an instrument, it has often been the practice to omit any requirement for a prohibitory period. For example, in the League of Nations, prohibitory period could well have found a place in Article 1 (3), which provides for withdrawal, but as the League was the first experiment in global organisation, such a provision might have prevented some member-States from participating and thus the endeavour to achieve universality would have been thwarted. However, two of the specialised agencies of the United Nations, namely FAO and ICAO, have an initial prohibitory period of four and three years respectively in accordance with Articles 19 and 95 of their respective Charters. But, there is no reason for the omission of an initial prohibitory period in the constituent intruments of the ILO, IRO, ITC or the UPU, or WMO, which provide for a " cooling-off period " of one to two years but no prohibitory period.[23]

[23] See Appendix.

Thus out of the ten Specialised Agencies of the United Nations which have a withdrawal clause, only two have a prohibitory period and that indeed of short duration. Again, the Council of Europe has a withdrawal clause without any initial prohibition.

However, full use has been made of the initial prohibitory clause in organisations which are of an administrative or military nature providing for collective security or mutual defence pacts. Thus in the Brussels Treaty of 1948, as amended by the Paris Protocol 1954,[24] Article XII provides that after the expiry of 50 years each of the high contracting parties has a right to cease to be a party thereto, provided one year's notice of denunciation has been previously given to the Belgian Government. Similarly, the NATO [25] stipulates an initial prohibitory period of twenty years, and the Anglo-Soviet Alliance of 1942 [26] (Article 8) specifies a period of twenty years, after which alone the high contracting parties could give notice of denunciation which would be effective after a period of one year.

Thus it is emphasised that, quite apart from the "cooling-off period," it is necessary in the case of an organisation which for a limited period is of supreme importance to prevent completely a termination of membership during that period: consequently, in such a case the formula which has been devised is that of the initial prohibitory period which overrides any inherent right of a member-State to denounce the treaty and withdraw from it. Thus in the European Coal and Steel Community, where the undertaking of the experiment would require the co-operation of all members concerned during the transition period, even amendment of the treaty is prohibited (Article 96).

In this connection it is essential to mention some of the advantages which accrue from a provision which makes withdrawal impossible for a certain defined period. First, it is a useful device for helping an organisation to weather its early difficulties.

[24] Treaty Series No. 39 (1955) Cmd. 9498. See Appendix.
[25] Beckett, *The North Atlantic Treaty, The Brussels Treaty and the Charter of the U.N.* (1950), p. 18.
[26] Treaty Series No. 2 (1942) Cmd. 6376. The Soviet Union has claimed that the United Kingdom directly violated its commitments, and the Soviet Government has, by decrees promulgated on May 7, 1955, declared the Treaty annulled. See Keesing's *Contemporary Archives*, June 4–11, 1955, p. 14,239. The U.K. had previously stated in a note to the U.S.S.R. that it did not accept this view. See Keesing, *op. cit.*, 1955, p. 14,029.

Every nascent institution requires support in the early stages of its existence and any withdrawal of a member-State during the period when it is establishing itself is a distinct set-back and should be avoided. Secondly, if the existence of an international organisation is an urgent necessity for a certain defined period and it is essential that there should be no dissenting members capable of withdrawing during that emergency, the initial prohibitory clause is the only formula which can achieve effective results. Thirdly, there is always the sanctity which comes from the lapse of time, and if a number of member-States have worked together successfully for a certain period, the chances are that they will continue to do so for long. Thus, if there is an initial prohibition for a period of, say, twenty years, from an administrative point of view it is reasonable to infer that if they have stayed together for a couple of decades they may pull together for ever. It can, however, be argued that in an international organisation which does not contemplate withdrawal at any stage, an initial prohibitory period would amount to a clear permission to withdraw after that period was over. Such a stipulation would, therefore, be improper for an organisation like the United Nations. This contention would be admissible if the inherent right of withdrawal were denied. However, if it is admitted that the right of withdrawal as a consequence of the principle of democracy and sovereignty has to be specifically restricted to be denied to the members, then the initial prohibitory clause may still have utility even for an organisation of the type of the United Nations.

"Cooling-Off Period"

In regard to the notice period, which is often described as the "cooling-off period," organisations of a permanent nature usually stipulate for at least two years. Thus not only the Covenant of the League of Nations but also the ILO prescribe a two-year "cooling-off period."[27] The other Specialised Agencies of the United Nations adopt one year's notice, as in Article 95 of the ICAO and Article 10 of the UPU. The constituent instruments of the ITU and WMO provide a withdrawal clause in which one year's notice is essential for withdrawal to be effective.[28] A

[27] See Appendix.
[28] See Article 20 of ITC Union and Article 30 of WMO. See also Appendix.

similar provision for one year's notice exists in Article 4 (10) of the IRO, an institution which, being of a temporary nature, has since been wound up. The FAO, however, provides for slightly more than one year, thus effecting a compromise between the requirements of one year's notice and that of two years by prescribing in the financial clause payment of the annual contribution not only for each year of its membership but also the entire financial year in which the notice takes effect.[29]

In this connection the opinion of Jenks [30] may be quoted; he regards a two-year period an essential minimum for organisations of the type of Specialised Agencies of the United Nations. The reasons are no doubt weighty because, apart from allowing a " cooling-off period " of sufficient duration for the purpose of reconsideration of the intention to withdraw, there is also the need to make budgetary adjustments for the payment of arrears, which may involve a substantial contribution from the coffers of the withdrawing member-State. It might well prove difficult to make the necessary financial arrangements within a period shorter than two years, although it is impossible to be dogmatic on this point, since much depends upon the functions of the organisations concerned. For example, the International Monetary Fund and the International Bank provide for withdrawal without any notice because they enjoy certain advantages which are denied by the constituent instruments of the FAO or other Specialised Agencies. Neither the Fund nor the Bank is likely to suffer a loss of revenue to the same extent as organisations which depend largely for their finances upon annual contributions from member-States.

However, apart from these monetary organisations, a short " cooling-off period " is a common feature of treaties whether they create international organisations or not. For example, the Statute of the Council of Europe [31] provides, in Article 7, a withdrawal clause which stipulates that " withdrawal shall take effect at the end of the financial year in which it is notified, if the notification is given during the first nine months of that financial year.

[29] See Article XVIII of FAO.
[30] B.Y.I.L., Vol. 22 (1945), p. 11, at p. 23.
[31] Treaty Series No. 24 (1955) Cmd. 9527; A.J.I.L., Vol. 43 (1949), Suppl. 162, 164. Article 26 has been amended. See also European Cultural Convention, Treaty Series No. 49 (1955) Cmd. 9545, and General Agreement on Privileges and Immunities of the Council of Europe, Treaty Series No. 34 (1951) Cmd. 8852.

If the notification is given in the last three months of the financial year, it shall take effect at the end of the next financial year." This provides, in effect, a notice period of anything from nine months to fifteen months. The European Economic Co-operation Convention [32] permits contracting parties to terminate the application of the Convention by giving twelve months' notice to the Government of the French Republic. Similarly, the Benelux Customs Convention [33] requires a notice of one year for termination to be effective. The Economic Co-operation Agreement between United States of America and United Kingdom [34] stipulates a machinery for consultation before any termination is possible. In accordance with Article XIII of the Agreement, if either party considers that there has been a fundamental change in the basic assumptions underlying the Agreement, it has to notify the other government in writing so that the parties can meet to agree upon any amendment, modification or termination which would be necessary. It is further provided that if after three months from such notification the two governments do not agree upon any action to be taken, either government may give notice in writing to terminate the agreement. In such an event, the agreement can only be terminated six months after the notice of such intention to terminate or any shorter period if agreed upon.

Again, organisations of a military or administrative nature usually stipulate for a period of notice of one year and occasionally two years but never longer than that. For example, the Bogotá Charter [35] as well as the Inter-American Treaty of Reciprocal Assistance [36] provide for a period of two years' notice but the other similar organisations like ANZUS [37], the Brussels Treaty [38] and NATO [39] stipulate a "cooling-off period" of one year only.

[32] Article 27. Treaty Series No. 59 (1949) Cmd. 7796.
[33] Article 8. See Van Houtte "Aspects juridiques de Bénélux" *Revue Générale de D. I. Public*, p. 387 at p. 392, for text of the Treaty of September 5, 1944, which came into force in 1948. See also Appendix.
[34] Treaty Series No. 41 (1948) Cmd. 7469. Amended Treaty Series No. 32 (1950) Cmd. 7961, No. 48 (1951) Cmd. 8275, No. 9 (1952) Cmd. 8480, No. 19 (1953) Cmd. 8790.
[35] Article 112. *See supra.*
[36] Article 25. *Documents on International Affairs*, R.I.I.A., 1947–48, p. 773.
[37] Article X. See *supra.*
[38] Article X. See *supra.*
[39] Article 13. See *supra.*

However, in organisations which are intended to be of a permanent nature and particularly where a close military alliance is stipulated which involves commitments of an executory type, the length of the " cooling-off period " and even the initial prohibitory period will not suffice to establish an organisation of an indestructible nature. But, as States are sovereign and are most reluctant to enter into a permanent commitment, the usual provision for revision of a treaty by mutual consent after an initial prohibitory period is the tightest provision for termination hitherto stipulated. Thus in an economic organisation of a really compact nature like the European Coal and Steel Community, Article 96 provides for a mere revision, and that too by mutual consent and only after the transition period is over. Similarly there is no provision for withdrawal from, or termination of, the Danube Commission, which represents a type of administrative organisation, although Article 46 of the Danube Convention 1948 [40] does provide for revision at the request of the majority of signatory States. When revision is indicated as the only method of termination, it has to be with the consent of all the signatories and, as this right exists in customary international law, it may be argued that an express stipulation is hardly necessary. However, when a provision is made for revision, it may have the effect of ruling out other methods of termination on the basis of *argumentum a contrario.*

The Problem of Outstanding Obligations

Outstanding obligations of a member-State at the time of its withdrawal from an organisation can be distinguished as follows: (a) financial, and (b) other than financial. They must be examined separately.

(1) Financial Obligations

A stipulation making the right of withdrawal subject to the requirement that outstanding financial obligations must be fulfilled at the time when the notice is deemed to take effect, is an

[40] The Convention was approved on August 18, 1948, by the seven riparian States, but the Commission is not recognised by the U.K., France, or U.S.A. See " The Danube Conference of 1948," I. M. Sinclair, B.Y.I.L., Vol. 25 (1948) p. 398, at p. 405. Colombos, *The International Law of the Sea* (3rd ed.) (1954) pp. 180–181.

important provision to safeguard the economic or financial interests of the organisation. This financial clause is present in the constituent instruments of a number of international organisations which depend for their continuance upon annual subscriptions from member-States. It takes two distinct forms :

First, if the constituent instrument provides for withdrawal, the financial clause exists as a limitation on the right of a member-State to withdraw until the financial obligations have been duly complied with. This is the normal financial clause examined in detail below.

Secondly, quite often when there is no withdrawal clause in a constituent instrument, and rarely even with a withdrawal clause, the organisation is empowered to suspend the voting rights of members in the event of default of financial dues to the organisation. This is examined later along with suspension.

However, when a specific provision for withdrawal exists the financial clause is generally a part of the withdrawal clause. Thus Article 5 of ILO lays down that the withdrawal notice shall take effect " subject to the member having fulfilled all financial obligations arising out of its membership." Similarly, in Article XVIII of FAO the financial provision is a part of the withdrawal clause.[42] The Covenant of the League of Nations also stipulates in the withdrawal clause (Article 1 (3)) the condition that until all obligations under the Covenant have been fulfilled withdrawal will not be effective. This would include financial as well as other obligations arising from the Covenant. This contention is borne out in actual practice because not only Costa Rica but even Germany settled their accounts before their withdrawal. It was on December 24, 1924, that Costa Rica signified its intention to withdraw in a letter to the Secretary-General of the League which carried with it a cheque to cover payment of contributions due from Costa Rica as a member from 1921 to 1924.[43] Similarly, the German Government paid to the League of Nations $184,000 in gold as its contribution in arrears and also undertook to settle its accounts entirely when it decided to withdraw [44] from the

[42] See Appendix: withdrawal is no longer made expressly subject to fulfilment of financial obligations in the Amended Constitution.
[43] League of Nations Monthly Summary, 1925, Vol. 5, p. 8.
[44] Notice of Withdrawal, October 10, 1933, *Official Journal*, 1934, p. 16.

League in October 1933.[45] Thus the stipulation " all obligations under the Covenant " being met, which exists in the withdrawal clause can be regarded as an effective financial safeguard.[46]

There are, however, instances of the existence of a withdrawal clause without the financial stipulation. Thus in the ICAO, though there is a withdrawal clause (Article 95), there is no provision subjecting withdrawal to the fulfilment of financial obligations of members. Article 62 provides, however, for suspension of voting powers in the event of financial default. Similarly, in the WMO, whereas Article 30 provides for withdrawal, there is no financial clause attached to it, though Article 31 of the Organisation confers the right of suspending defaulting members. Another example is furnished by the Constitution of the IRO which provides for withdrawal in Article 4 (10) without a financial clause of the nature under discussion.[47] Similarly, the ITC [48] and the UPU[49] have withdrawal clauses but nothing to safeguard the financial position in the event of withdrawal by a member-State. This clearly indicates that the financial clause is not an essential

[45] League of Nations X Financial Administration, Audited Accounts for 17th Financial Period, Auditor's Report, p. 82. A 3, 1936, X 1.

[46] Japan also paid her contributions on withdrawal, *ibid.* She gave notice of withdrawal by telegram on March 27, 1933. See League of Nations Monthly Summary, March 1933, pp. 112–113.

Similarly in the case of Brazil which gave notice of withdrawal on June 12, 1926, *ibid.*, June, 1926, pp. 143–144. However, Paraguay allowed its notice of withdrawal to expire on February 24, 1937, when it was heavily in arrear. See Denys P. Myers, " Membership and Indebtedness in a League of Nations " A.J.I.L., Vol. 32 (1938), pp. 148–152, and the references thereunder. See also A 3, 1938; X 1, p. 17, and A 3, 1939, X 1, p. 21. The default gave rise to a good deal of debate as to the effect of Article 1 (3). See Myers, *supra*, and B.Y.I.L., Vol. 19 (1938) pp. 218–221. Honduras and Nicaragua also withdrew whilst in arrears but their notices were allowed to take effect as a result of a prior agreement to compound their contributions. See Myers, *supra*.

The report of the fourth Committee (Financial) was inconclusive on the issues raised by the Paraguayan default. No practical problems arose in the instances of Honduras and Nicaragua. For documents see Myers, *supra*, B.Y.I.L. *supra*, and for further literature on the interpretations of the Article, see Ch. Rousseau, " La Sortie de la Société des Nations," *Revue Générale de D.I. Public*, Vol. 41, 1934, pp. 295 *et seq.* Schücking and Wehberg *Die Satzung des Völkerbundes*, 2nd ed. 1924, " Conditions of withdrawal from the League of Nations," J. J. Burns, A.J.I.L., Vol. 29 (1935), p. 40, Fenwick, " The Fulfilment of Obligations as a condition of withdrawal from the League of Nations," A.J.I.L., Vol. 27 (1933), p. 516.

[47] See *supra* and Appendix.

[48] Article 20.

[49] Article 10.

constituent of withdrawal, and it can exist as a part of the suspension clause also, but with a different legal effect. Thus where a withdrawal exists without the financial stipulation, it is certainly possible for a member-State to withdraw without payment of its financial dues to the Organisation. Although, morally, such action may be reprehensible, in strict law it is possible for withdrawal from these organisations to take place without the discharge of financial obligations—a serious flaw in the constituent instrument.

The same would probably appear to be the position in those international organisations which do not have a withdrawal stipulation. Thus in WHO [50] where no provision for withdrawal exists and hence there is no corresponding financial clause of the type mentioned in ILO (Article 5) and FAO (Article XVIII), it is possible for a sovereign member-State to exercise its inherent right to withdraw, as has been the case with the Soviet Union, Poland and others, and in that event the withdrawal could take place without payment of the financial dues to the Organisation.

It is interesting to note that when organisations do not have a withdrawal clause at all, or if they have one, it is without a financial stipulation, sufficient economic safeguard is not provided by the introduction of a suspension clause. Although this aspect of termination is discussed later, it is necessary to emphasise here that where withdrawal is stipulated the financial clause must be incorporated with it, otherwise there would be no financial safeguard if a member-State decided to withdraw with considerable arrears due to the Organisation. Again, if an inherent right of withdrawal is admitted in the absence of a specific provision of withdrawal, a financial clause expressly to prohibit withdrawal until financial obligations have been met is essential. It is only in the event of complete denial of an inherent right of withdrawal that a provision of this nature is not necessary. To empower an organisation to suspend the voting rights of a member-State in the event of financial default is an effective safeguard only if the basic advantages of membership are so obvious that they outweigh any disadvantages resulting from withdrawal. In that event alone would the threat of suspension prove effective. As the nation-State generally regards any treaty, let alone that which

[50] See *supra*.

gives birth to an international organisation, as a limitation on its sovereignty, withdrawal is more often than not an attractive right and in that event a suspension clause is not likely to be effective.

It would, therefore, not be wrong to conclude that international organisations which require payment from members for their continuance must have a financial clause as a safeguard, irrespective of whether there is a withdrawal clause or not. The case of the United Nations, however, may be regarded as slightly different because of the definite intention of the framers of the Charter to discourage withdrawal so far as possible and an independent financial stipulation, even without a withdrawal clause might have tended to foster the idea that such a course would not be open to objection. This aspect of the matter is touched on again in discussing suspension.

International organisations of a military or administrative nature do not have a financial clause even though they stipulate withdrawal. The Bogotá Charter, the Inter-American Treaty of Reciprocal Assistance, the Brussels Treaty and the ANZUS Pact do not contain a financial clause though they provide for withdrawal.[51] This is probably so because, in the main, the financial implications of the decisions taken by the organisation fall upon the member-States, and hence the financial clause is not so essential. Similarly, in some of the economic organisations where the advantage of continued membership is great, a financial clause is not stipulated, as, for example, the European Economic Co-operation Convention, where withdrawal is provided (Article 27),[52] but there is no corresponding limitation on the exercise of it by making it subject to financial obligations being met.

Thus, the existence of the financial clause or otherwise is completely dependent upon the nature and functions of the organisation and the intention of the parties in creating it. In the International Monetary Fund and the Bank, though there is provision for withdrawal, it is without any financial clause because the two organisations are placed in such a favourable position to exercise the right of suspending or expelling members in the event of a financial default.

[51] See *supra* and Appendix.
[52] See Treaty Series No. 59 (1949) Cmd. 7796.

The foolproof financial formula would, therefore, be to have a financial stipulation not only in the withdrawal clause but also in the suspension clause, so that the Organisation would have a *locus standi*, not only effectively to recover arrears of subscription during continuance of membership but, in the event of withdrawal, also be in a position to prevent the exit of the member-State until arrears of subscription had been paid. This comprehensive formula is best typified in the ILO Constitution which has (Article 1 (5)) a financial stipulation in a withdrawal clause, while Article 13 (4) empowers the organisation to suspend a member-State in the event of financial default,

(2) Obligations other than Financial

It is surprising that out of ten Specialised Agencies of the United Nations which have a withdrawal clause only three, namely, ILO (Article 1 (5)) FAO (Article XVIII) and UNESCO (Article 2 (6)), have financial safeguards. Again, none of the international organisations of a military or administrative nature which have withdrawal clauses contain any financial provision.

The Covenant of the League of Nations

The only example of a constituent instrument incorporating comprehensive formulae for ensuring the fulfilment of all outstanding international obligations, whether arising under Covenant or not, financial or otherwise, prior to withdrawal, is the Covenant of the League, Article 1 (3), which reads as follows:

> " Any member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all obligations under this Covenant shall have been fulfilled at the time of its withdrawal."

The outstanding obligations described above may be classified under the following headings for the purpose of discussion:

International obligations; and

Covenantal obligations—which may be

financial;

fundamental; or

formal.

In regard to *international obligations*, the reason for such an insertion in the Covenant of the League is not exactly known.

Jean Ray [53] has maintained that the condition relating to fulfilment of international obligations in general is useless. In his view it is the provision relating to " obligations under the Covenant " which really matters. There can be no dispute relating to the existence of international obligations as distinct from Covenantal obligations. For example, obligations arising out of a treaty or a duty to implement an award of an arbitral tribunal can be typical examples of obligations unaffected by membership in the League, and a failure to respect them would not normally interfere with the functions of the League. The sole reason for mentioning such obligations separately appears to be that a member-State should not be allowed, after violating an international obligation, to withdraw from the League in order to escape from the consequences of membership. The Covenant mentions at the very outset, in its Preamble, the necessity of observance of all international obligations by League members which is declared to be an avowed aim of the Organisation. Thus, in direct conformity with the principle of maintenance of scrupulous respect for treaties and the observance of international law, it has been found essential specifically to mention in the withdrawal clause international obligations as a part of those outstanding obligations which have to be met before withdrawal. The principle appears to be sound that a member-State having violated international law, though not necessarily the provisions of the Covenant, must not be permitted to escape from the League just because membership may become inconvenient.

The *financial* part of the covenant obligations has already been discussed and no further elucidation appears necessary.

Covenantal obligations might be fundamental or formal. Having regard to the terms of Article 1 (3) of the Covenant of the League, both types of obligation must have been met before withdrawal could become effective. The words " *all* its obligations " make it quite obvious that even the lesser provisions of the Covenant including, of course, the financial ones, must be fulfilled for the purpose of due compliance with Article 1 (3). However, for violation of the fundamental provisions like Article 12, 13 or 15 of the Covenant, a more drastic remedy is available by which a member-State could be expelled from the League

[53] Jean Ray, *Commentaire du Pacte de la Société des Nations* (1930), p. 111.

(Article 16 (4)). Thus, if a member-State desired to withdraw after violating the fundamental provisions of the Covenant, technically it could not do so because under Article 16, it was either liable to be expelled or subjected to "sanctions." However, if no such action were taken and the defaulting member desired to withdraw, it might in actual fact succeed in doing so, even though in accordance with the strict interpretation of Article 1 (3) such a withdrawal would not be legal. There are three precedents in international practice which indicate that the withdrawal could actually be accomplished although it must, in law, be regarded as improper.

In October, 1933, the German Government notified the Secretary-General of its intention to withdraw from the League of Nations.[54] Germany had referred to the existence of a German Air Force in a communication which she had made to the British Air Attaché and had thus admitted an act which clearly constituted a violation of the Treaty of Versailles.[55] However, she insisted on her withdrawal and after paying her contributions, which were in arrears, severed her relations with the organisation.

The case of Japan is still more significant because by a Resolution of the Assembly adopted on February 4th, 1933, Japan was declared an aggressor State having violated its obligations under the Covenant.[56] On March 27, 1933, the Japanese Government notified the Secretary-General of its intention to withdraw from the League of Nations.[57] Neither the Council nor the Assembly made any statement with regard to Japan's fulfilment or non-fulfilment of international obligations and obligations under the Covenant, though Japan proceeded to sever her relationship with the organisation.

The case of Paraguay is almost on similar lines because the Council of the League condemned that State as an aggressor declaring that it had violated its obligations under the Covenant. Moreover, as a result of this condemnation, the embargo on arms to Bolivia was lifted, while that on the supply of arms to Paraguay was maintained.

[54] *Official Journal*, 1934, p. 16.
[55] Nuremberg Trial Document, 044 T.C. Official Text, Vol. 39, p. 45 (Report of British Air Attaché to the British Ambassador).
[56] *Official Journal* (1933), Special Supplement No. 112, p. 22.
[57] *Official Journal* (1933), p. 657.

It is quite obvious that none of these three States could claim to have fulfilled its obligations under the Covenant and hence they could not be deemed to have lawfully withdrawn from the League. It can even be asserted that the *raison d'être* of Article 1 (3) is to prevent States from committing aggression and then endeavouring to free themselves from the obligations and restrictions which the Covenant imposes.[58] In all the three cases mentioned above, member-States succeeded in effectively withdrawing from the Organisation in spite of this salutary provision of Article 1 (3) of the Covenant. A suggestion was made by Mr. P. J. Noel-Baker that a Resolution should be adopted by the Assembly asserting that they could not consider themselves legally freed from the obligations of the Covenant.[59]

The main reason for the ineffectiveness of the provisions of Article 1 (3) appears to be the failure in the Covenant to set out a regular procedure empowering organs of the League to take necessary steps in this connection. For example, it is nowhere laid down which organ of the League would judge whether international obligations or obligations under the Covenant had been fulfilled by a withdrawing member. In this connection it is necessary to mention the Wilsonian interpretation of the withdrawal clause, which made the withdrawing State the sole judge of whether or not it had fulfilled its international obligations and its obligations under the Covenant. This has been seriously challenged by other writers and Schücking and Wehberg have suggested a reference being made to a court of law like the Permanent Court, because both the organisation and the member would be parties to the dispute.[60] Several theories were pronounced when the League of Nations was in existence as to the competent authority to judge whether these outstanding obligations had been met by a withdrawing member or not. Apart from the American theory of making the withdrawing State itself

[58] See under (IV) *supra*, and Report of Advisory Committee of March 15, 1935, adopted on May 17, 1935, by the Assembly. See League of Nations *Official Journal*, " Dispute between Bolivia and Paraguay." Special Supplements 1934, No. 134, p. 56 and No. 135, pp. 35–41. Jean Ray, in *op. cit.* p. 111, has clearly stated that the real object of the provision was to prevent a member-State from contending that by ceasing to be a member it escaped the consequences of obligations already accrued during membership.

[59] Noel-Baker in B.Y.I.L., Vol. 16 (1935), pp. 153–155.

[60] Schücking and Wehberg, *Die Satzung des Völkerbundes*, Vol. 1 (3rd ed. 1931), p. 373.

the judge, there were those who proposed the Assembly and the Council. It is submitted that as the withdrawal is from an organisation, the latter should be the judge of a condition like the one visualised in Article 1 (3) of the Covenant. A reference to the Permanent Court of International Justice could only be made if the withdrawing State disputed the decision of the organisation. The organ that could be empowered to make this decision would be the Assembly, being the parent representative body of all signatories of the Covenant. However, as already stated, the Covenant being completely silent on the point of procedure, no less than three defaulting member-States succeeded in withdrawing from the League.

Chapter 3

SUSPENSION

Suspension, by its very nature, implies temporary termination of membership by depriving the suspended member of its privileges such as voting rights. A suspension clause is quite a common feature of an international constituent instrument and exists in the shape of a right conferred on the organisation to take action against a defaulting member. Defaults giving rise to suspension may be classified as breaches of financial obligations to the organisation and other provisions of the organisation.

A study of international constituent instruments reveals that quite often both these occasions are specifically stipulated and the organisation is empowered to exercise this right of suspension in both cases. Thus in the ICAO, Article 62 empowers the Assembly to suspend the voting rights of the contracting State both in the Assembly and in the Council if it fails to discharge within a reasonable period its financial obligation to the Organisation. However, Article 82 of ICAO stipulates suspension in the event of default under the provisions of Chapter XVIII only, which relates to settlement of disputes. Again, the WHO similarly contemplates in Article 7 suspension of voting privileges and services to which a member is entitled in the event of:

(i) failure to meet financial obligations to the Organisation, or

(ii) "other exceptional circumstances."

The latter would probably include violations of the provisions of the Constitution. The International Bank has a sort of all-embracing clause by which the Organisation is empowered to suspend a member on failure to "fulfil any of its obligations."[1] In Article XV, Section 2, of the International Monetary Fund, suspension resulting in ineligibility to use the Fund and subsequent compulsory withdrawal are prescribed if a member fails to fulfil "any obligations under the agreement." This would cover both financial and other obligations. Similarly, in the

[1] Article VI (2).

WMO, Article 31 provides for suspension of a member-State which fails " to meet its financial obligations to the Organisation or otherwise fails in its obligations under the present Convention."

However, not every international constituent instrument empowers an organisation to suspend a member on both counts. We have in this respect the significant example of FAO, which does not empower the Organisation to suspend or expel any of its member-States for any reason whatsoever. Again, the Constitution of ILO empowers the Conference, in Article 13 (4), to suspend a member which is in arrears in the payment of its financial contribution, but not for any other default.

The ITU [2] permits member-States to denounce the Convention, but does not empower the Organisation to suspend a member for any kind of default.

Thus a suspension clause cannot be regarded as an essential provision of every constituent instrument. Neither can it be said that the organisation would invariably be empowered to exercise this right in the event of any kind of default. However, if an organisation stipulates suspension, it is generally on the ground of financial default, rarely for other than financial default alone, but quite often for both.

If a close scrutiny of the suspension clause is made, it will be found that the constituent instruments differ on the following points:

(i) nature of suspension, whether permissive or mandatory;
(ii) the need for giving the defaulting member-State notice and/or opportunity to be heard before enforcing suspension;
(iii) the conditions on which suspension is authorised;
(iv) the organs of the international body which are empowered to exercise this right;
(v) the extent of the loss of rights of membership on suspension; and
(vi) the period for which the member is likely to be deprived of its privileges.

[2] Article 20.

Permissive and Mandatory Suspension

It is essential to examine the constituent instrument to see if suspension is mandatory or permissive. Thus on a correct interpretation of Article 13 (4) of ILO, the suspension of the voting rights of a defaulting member-State is mandatory as the stipulation is " a member *shall* have no right to vote . . ." The United Nations Charter also visualises mandatory suspension of voting rights in the event of financial default of a certain magnitude, specified in Article 19.[3] However, Article 5 provides a permissive type of suspension when preventive or enforcement action has been taken against a member by the Security Council, because the words used are " may be suspended," as against Article 19 which runs " shall have no vote in the General Assembly." However, both in ILA, Article 13 (4), and United Nations Charter, Article 19, though mandatory suspension is prescribed in the event of financial default of a certain magnitude, power is given to the Conference and the General Assembly respectively by a two-thirds majority to permit a defaulting member to exercise its right of vote, provided the Conference of ILO or the General Assembly of the United Nations are satisfied that the failure to pay is due to conditions beyond the control of the member. This has the effect of introducing an element of discretion into an otherwise mandatory provision regarding suspension.

However, a number of constituent instruments provide a permissive type of suspension. For example, WHO Article 7 provides ". . . the Health Assembly *may* suspend . . . the voting privileges . . ." Similarly, the Fund and the Bank use the words " *may* declare the member ineligible and *may* suspend its membership " in Article XV (2) and VI (2) respectively. In these constituent instruments, a mere permissive type of suspension exists at the discretion of the appropriate organ authorised to exercise this right.

[3] Article 19 of the United Nations Charter reads as follows: " A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organisation shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member."

Again, the ICAO stipulates, in Article 88, a mandatory suspension in the event of default of Articles 84 to 87 pertaining to settlement of disputes, but it is significant that a mere permissive suspension is visualised in Article 62 in the event of financial default. The word " shall " is used in Article 88 and " may " in Article 62 to emphasise this clear distinction. In the IRO, Article 4 (8) stipulates suspension in the event of persistent violation of the principles of the Constitution for which the United Nations Charter provides the more drastic method of expulsion, but the IRO uses the words " may be suspended," making it clear that the General Council can exercise its discretion. The WMO also stipulates a permissive suspension clause—*vide* Article 31, which states " the congress may by resolution suspend." Again, the Council of Europe visualises permissive suspension in both Articles 8 and 9 in respect of financial default or serious violation of Article 3, as the rule is that the Committee of Ministers " may suspend " a member of its right of representation. Thus with the exception of Article 88 of ICAO, and, to a modified extent, in ILO and the United Nations Charter, it would be true to say that most of the international organisations have a permissive type of suspension clause giving necessary discretion to the appropriate organ to suspend or not according to the circumstances of each case. It is submitted that the permissive suspension clause is the correct device because mandatory suspension may create problems instead of solving them.

Notice to the Defaulting Member

On the analogy of notice which is a *sine qua non* of a withdrawal clause, it is considered necessary by some international organisations to give the defaulting member-State not only prior notice of the contemplated action to be taken against it, but also an opportunity to be heard before enforcing suspension. In this connection it is essential to mention the special procedure stipulated by the International Monetary Fund and the International Bank. Incidentally, since this procedure is not to be found in other constitutions, it represents a distinguishing characteristic. Thus in Article XV, clause (c), of the International Monetary Fund it is stipulated that regulations should be adopted to ensure that before action is taken to suspend a member

by making it ineligible to use the resources of the Fund adequate opportunity should be given "for stating its case both orally and in writing," in addition to the requirement that the member should be informed "in reasonable time of the complaint against it."

The International Bank has a similar provision incorporated in section 21 of its by-laws, though the Articles of Agreement of the Bank do not specifically provide for an opportunity to be given to the defaulting member-State to be heard before action is taken against it. The by-law of the Bank, however, has the effect of affording the same facility to the defaulting member-State as is provided by the Articles of Agreement of the International Monetary Fund. The procedure stipulated by Section 21 of the Bank's by-laws specifically refers to suspension and requires a fresh hearing and a decision of the Board of Governors on the recommendation of the Executive Directors. It is significant that the defaulting member-State is given the opportunity to be heard in person, both before the Executive Directors as well as the Board of Governors. This unique but salutary provision is reproduced below:

> "Before any member is suspended from membership in the Bank, the matter shall be considered by the Executive Directors who shall inform the member in reasonable time of the complaint against it and allow the member an adequate opportunity for stating its case both orally and in writing. The Executive Directors shall recommend to the Board of Governors the action they deem appropriate. The member shall be informed of the recommendation and the date on which its case will be considered by the Board and shall be given a reasonable time within which to present its case to the Board both orally and in writing. Any member so electing may waive this provision."

The main difference between the provisions of the Fund and the Bank is that whereas the latter provides an elaborate machinery for suspension and allows expulsion to take place automatically after a period of one year, the former requires adequate opportunity to be given to the defaulting member-State before it is rendered ineligible to use the resources of the Fund, in addition to allowing a reasonable interval to elapse before the

elaborate machinery of section 21 of the Bank's by-laws is brought into operation. It cannot be doubted that the provision relating to an opportunity to be given to the defaulting member-State to express its viewpoint is a very healthy and desirable safeguard which should be encouraged in international organisations. Although, usually, constituent instruments do not provide for any notice to be given before action to suspend a member is taken, it is submitted that in respect of the financial provisions, a short notice ranging from one to three or six months at the most would help to remind the defaulting member-State of its obligations.

Authorisation of Suspension

The two broad categories of circumstances generally stipulated in constituent instruments authorising an international organisation to suspend a member-State have already been mentioned. It is convenient to analyse suspension more closely under the following headings:

(a) default of financial obligations to the organisation; and
(b) default of other provisions of the organisation.

In respect of (a) above, the constitution of ILO perhaps furnishes the best example of the details of the conditions which have to be present before the power to suspend can be exercised. Thus, Article 13 (4) lays down that if a member is in arrears in the payment of its financial contribution to the Organisation to the extent that the " amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years," that member is deprived of its voting right. A similar provision exists in the United Nations Charter, *vide* Article 19, which also prescribes suspension in the event of arrears being equal to or in excess of the amount of the contributions due from a member for the previous two years. However, the majority of constituent instruments have a simple device and merely recite failure to discharge " the financial obligations to the Organisation " as a condition sufficient to warrant suspension. Thus ICAO, WHO and WMO do not give any details beyond expressly stating the above-mentioned formula. Apart from the Specialised Agencies, the Statute of the Council of Europe furnishes a parallel

in Article 9 which provides for suspension of a member-State " which has failed to fulfil its financial obligations."

In regard to (b), which relates to default of other provisions of the organisation, the ICAO furnishes the best example of how violation of certain specific or mandatory provisions can lead to suspension. As already stated, Article 88 makes provision for suspension of the voting power of a contracting State that is " found in default under the provisions of Chapter XVIII," which relates to settlement of disputes. Similarly, in the United Nations Charter, Article 5, as distinguished from Article 19, permits denial of voting rights when the Security Council has taken preventive or enforcement action against a member-State.

Again, in the Council of Europe, Article 8 provides for immediate suspension in the event of violation of Article 3 of the Statute, which is to be read with Article 1 stipulating the aims of the Council of Europe. The machinery of termination provided by Article 8 of the Statute is interesting because it differs from the constituent instruments of the Specialised Agencies of the United Nations. The Statute regards Articles 1 and 3 as the basic provisions of the Organisation and Article 8, therefore, lays down that a member who " has seriously violated Article 3 may be suspended from its right of representation and requested by the Committee of Ministers to withdraw under Article 7." " If such member does not comply with this request," the Committee is empowered to terminate its membership. Thus suspension in the above context is merely a temporary arrangement until the defaulting member-State has exercised the option to withdraw under Article 7 to save the Committee of Ministers from facing the embarrassing situation of having to expel that member.[4]

However, other constituent instruments resort to a simple all-embracing formula covering any breach of the provisions of the agreement. Thus the International Bank and the Monetary Fund, as already stated, provide for suspension of a member in the event of failure to fulfil " any of its obligations to the Organisation." Similarly, in WHO, Article 31 permits suspension if a member " fails in its obligations under the present Convention." Such stipulations would entitle the Organisation to take action in the event of even a minor default relating to some

[4] The power of expulsion is discussed below, Chap. 4.

unimportant provision of the Convention or Agreement, but the Organisation would obviouly exercise its discretion in so acting, as loss of membership to any international institution seriously reduces its effectiveness and the extent of its activities and operations. In some constitutions, discretion is explicit or virtually explicit, as, for example, in WHO, which provides, in Article 7, suspension of a member-State not only for failure to meet the financial obligations but also " in other exceptional circumstances." The judge of the " exceptional circumstances " in this case is the Health Assembly, which would distinguish between what it regards as a vital provision as against the unimportant ones, only the violation of the former necessitating suspension.

A possible third category of suspension clause is furnished by the peculiar stipulations of IRO and UNESCO. In both these Organisations the constitutional link with the United Nations, verging on dependence on that Organisation, is marked. Thus Article 2 (4) of the constitution of UNESCO stipulates suspension of its members of its organisation in the event of their suspension from the United Nations and only on the request of the latter. A similar provision is made in the IRO, in Article 4 (5) of its Constitution. However, Article 4 (7) and (8) empowers the Organisation to suspend member-States not only for persistent violation of the principles of its Constitution but in the case of those members of the Organisation which are not members of the United Nations, there is provision for suspension with the approval of the General Assembly in the event of persistent violation of the United Nations Charter. This latter provision is highly significant because it indicates the close constitutional dependence of the IRO on the United Nations, making it quite clear that States desirous of taking advantage of this Specialised Agency could only do so while fully upholding the principles of the Charter. It is submitted that however dependent a Specialised Agency may be on the United Nations, it must have its own provision for suspension in respect of failure of its member-States to discharge the financial obligations to the Organisation; it would otherwise be deprived of an effective safeguard in regard to its monetary interests.

This need was illustrated by the adoption at the fourth session of UNESCO General Conference of an amendment to Article 8

providing for suspension of the voting rights in the General Conference of a State in arrears in the payment of its financial contribution.[5]

Organs Empowered to Suspend

The organs of the various international institutions vested with the right of suspension differ from one constituent instrument to another. The common practice is, however, to authorise the main parent organ to take this action. Thus the Health Assembly in WHO,[6] the Congress in WMO,[7] the Assembly in ICAO [8] are empowered to suspend a member. However, in the United Nations Charter, when a member is suspended under Article 5 on the ground that preventive or enforcement action has been taken against it by the Security Council, the recommendation for suspension must emanate from the Security Council, though the final decision rests with the General Assembly. Thus, here again, the General Assembly rather than any other organ has been empowered to have the last word whether to suspend or not. It is true, however, that as the preventive or enforcement action is taken by the Security Council and as that is the sole ground for suspension under Article 5, the power to restore the lost rights and privileges of membership are given to the Security Council even though the initial suspension can only take place with the assent of the General Assembly. As Article 18 of the United Nations Charter declares suspension to be an " important question " it would need a two-thirds majority of members present and voting in the Assembly for a decision to be taken. The position in ILO is slightly different because Article 18 (4) does not specifically empower any organ to exercise this right, though power is given to the Conference, if acting on a two-thirds majority, to permit a defaulting member to exercise its right to vote if it is satisfied that the failure to pay was due to conditions beyond the control of the member. Thus by implication it could be stated that the Conference would ultimately be the appropriate organ vested with the discretion to exercise the power of suspension in the circumstances of each case. A similar provision exists

[5] UNESCO Publication, C.P.S.D., 1425.
[6] Article 7.
[7] Article 31.
[8] Article 88.

in Article 19 of the United Nations Charter, where suspension appears to take place *ipso facto* should a member fall into arrears in the payment of its financial contributions, though the General Assembly has the right to permit, by a two-thirds majority, such a member to vote if satisfied that the failure was due to conditions beyond the member's control. Similarly, in the International Bank, Article VI (2) requires a decision of a majority of the Governors exercising a majority of the total voting power. In the International Monetary Fund also, the Board of Governors alone can exercise this right, and Article XII clearly stipulates that the Governors cannot delegate this power to the Executive Directors. Again, in the IRO, a defunct organisation, the General Council was the parent representative organ of all member-States, and hence Article 4 (8) provided for suspension at the instance of the General Council. However, in respect of members of the Organisation which were not members of the United Nations the approval of the United Nations General Assembly was considered necessary. In the Council of Europe the Committee of Ministers is vested with powers of suspension (Article 9) because, in essence, the Committee is the parent representative body and the seat of power in the organisation. Again, in the ICAO also, it is the Assembly which is empowered to exercise the right of permissive suspension in accordance with Article 62 and mandatory suspension in accordance with Article 88. This indicates that suspension is an important right conferred on an international organisation vested in the parent body of the organisation, which consists of representatives of all the States that are signatories to the constituent instrument. The right to suspend is rarely, if ever, vested in any of the less representative organs or sub-committees of an organisation, even though they may be of greater importance than the parent body. Thus by the United Nations Charter initial suspension as well as expulsion are rights exercised by the General Assembly alone, even though the Security Council is a more powerful organ of the institution and the power to *recommend* expulsion and suspension has been conferred upon it.[9]

Again, the type of majority vote required in the appropriate organs to suspend a member varies from a two-thirds majority

[9] See Articles 5 and 6.

of WMO,[10] ILO,[11] and United Nations [12] to a simple majority of the Assembly in ICAO [13] and WHO.[14] It is submitted that in case of suspension for financial default a simple majority should be considered more than adequate, because the fact that arrears exist is something concrete and a definitely ascertainable fact which should result in loss of rights of membership *ipso facto*, without necessitating a resolution or a decision of the parent body. However, in the event of a default other than financial, a fixed majority could possibly be considered.

Extent of the Loss of Rights

The extent of loss of rights of membership is not often defined. The common practice appears to be to insert in the constituent instrument a simple formula suspending " voting privileges and services to which a member is entitled " : Article 7 of WHO furnishes a typical example. A more comprehensive clause is provided by Article VI (2) of the International Bank which declares that a suspended member " shall not be entitled to exercise any right under this agreement except the right of withdrawal." In WMO a member may be suspended from " exercising rights and enjoying privileges as a member of the Organisation " (Article 31). In the IRO suspension covers " the rights and privileges of the Organisation " (Article 4 (7)). However, in contrast to this all-embracing formula, some instruments restrict the effect of suspension to voting rights in certain organs of the institution only. Thus ILO merely stipulates that a member in arrears to the extent stated will have " no vote in the Conference, Governing Body, in any Committee or in the electing of members of Governing bodies," *vide* Article 13 (4). Similarly in ICAO both permissive suspension under Article 62 and mandatory suspension under Article 88 provide for " suspension of voting power in the Assembly and the Council." In the United Nations Charter, suspension is confined to the loss of vote in the General Assembly only. In the International Monetary Fund suspension means " ineligibility to use the resources of the Fund."

[10] Articles 10 and 31.
[11] Article 13 (4).
[12] Articles 5, 9, 17 and 27.
[13] Articles 48 (C) and 88.
[14] Articles 7 and 60.

In the Statute of the Council of Europe suspension means loss of representation on the Committee and on the Consultative Assembly which, for practical purposes, terminates the entire rights of membership without releasing the defaulting member-State from its obligations to the Organisation.

Period of Suspension

When a financial default leads to suspension, the constituent instrument sometimes limits the period of suspension until such time as the arrears have not been paid. Thus ILO appears to lay down that as long as the member-State is in arrears in the payment of its financial obligations, it shall have no vote in some of the organs of the institution.[15] The United Nations Charter (Article 19) appears to provide a similar suspension of voting power in the General Assembly so long as the member-State is in arrears in respect of its financial commitments to the Organisation. As soon as the arrears are paid, membership with all its rights must be deemed to be restored in both these Organisations. Again, in Article 9 of the Statute of the Council of Europe, suspension continues " during such period as the financial obligation remains unfulfilled." Similarly, in the WMO Convention, Article 10 expressly provides for suspension of rights and privileges of a member " until it has met such financial or other obligations." This would even cover default in respect of obligations other than financial, and immediately on compliance the position is rectified and membership would appear to be restored. The ICAO stipulates in Article 62 that a reasonable period should be given to the defaulting member-State to discharge its financial obligation before suspension is resorted to. There is no specific provision laying down the method of restoration of suspended privileges in Articles 62 and 88 of ICAO. It may be presumed that the Assembly declared competent to suspend would also be competent to restore privileges of membership when the arrears were paid. However, in Article 7 of WHO, where the voting privilege and services to which a member is entitled have once been suspended, it is expressly stipulated that the Health Assembly shall have the right to restore such voting privileges, *etc.*, when the financial obligations have been met. This indicates

[15] Article 13 (4).

that in ICAO and WHO, when arrears are paid up, a resolution of the Assembly would be necessary to restore a member to its former position. In the International Bank, Article VI (2) provides for suspension for a fixed period of one year unless a decision is taken by a majority of the Governors exercising a majority of the total voting power to restore the member to good standing. It means, therefore, that a suspended member is given a notice of one year pending expulsion. But if the default is rectified earlier, the organ empowered to suspend is also empowered to restore the lost membership to the State. Thus, in the Bank, as a formal requirement, a resolution would be necessary, and the mere payment of arrears would not *ipso facto* restore the lost privileges of a member, in contrast to the position in some other organisations. In the circumstances, it can be stated that restoration of rights of membership after suspension may or may not require a resolution of the appropriate organ, but the period of suspension is generally limited to the date of compliance with unfulfilled obligations whether financial or otherwise. In this respect it is submitted that the correct formula is to distinguish between financial and other defaults and to prescribe, in the case of the former, *ipso facto* restoration of membership on payment of arrears. However, in the case of the latter, since a close examination would be necessary to determine the extent to which the breach had been remedied, a resolution of the appropriate organ empowered to suspend must be necessary to restore membership to the erstwhile defaulting State.

On the whole, suspension is definitely contemplated as a sanction to compel obedience to the provisions of the constitution of the international organisation, financial or otherwise. It operates by placing in abeyance the rights and privileges of a member but does not lead to loss of membership until the default is persistent and continuous, and that too, only if the organisation is empowered to exercise the right of expulsion.

The legal implication, therefore, is that a suspended member continues to remain saddled with the obligations of membership, though temporarily losing some or part of the concomitant privileges. This is clearly brought out in a special clause of Section 2 of Article 6 of the International Bank:

> "While under suspension, a member shall not be entitled to exercise any rights under this agreement, except the right of withdrawal, *but shall remain subject to all obligations.*"

Since under some other constitutions even the right of representation is not entirely lost during the period of suspension, there can be no question of a suspended member escaping obligations arising under the convention, even temporarily. Thus, for example, if one of the permanent members of the Security Council is in arrears in the payment of its financial contributions to the Organisation to the extent specified in Article 19 and is consequently suspended, it would certainly lose its vote in the General Assembly but not in the Security Council, still less its membership of the United Nations. In the circumstances, a suspended State could hardly argue that it was free from the obligations of the Charter with effect from the date of suspension. It can, therefore, be said to be beyond question that during suspension a member continues to be bound by the provisions of the constituent instrument to which it is a signatory.

It is significant that suspension should be conspicuously absent in constituent instruments which give birth to military or administrative organisations. Thus there is no such provision in the Inter-American Treaty of Reciprocal Assistance, Bogotá Charter, NATO, ANZUS Pact, and the Brussels and Dunkirk Treaties. It is also absent in the Danube Convention of 1948 and the European Coal and Steel Community, which is one of the most recently formed international bodies. Thus the suspension clause is a peculiar feature of the Specialised Agencies of the United Nations and is not generally found in other organisations. The Council of Europe has adopted this procedure,[16] and the other example of suspension *cum* expulsion is furnished by Article 26 of the European Economic Co-operation Convention, but as the legal effect of the action taken is expulsion rather than suspension, this is discussed subsequently under the heading of expulsion.

[16] Article 8 of the Statute.

It may, therefore, be observed that apart from Specialised Agencies of the United Nations, of which no fewer than nine have suspension clauses, there are very few international organisations which provide for this method of temporary termination of membership.

Chapter 4

EXPULSION

Expulsion, which brings about immediate, complete and permanent termination of membership of a sovereign State, must be regarded as a drastic measure taken by the Organisation and can only be justified on the ground that any further continuance of the defaulting State as a member would be likely to do considerable damage to the Organisation or prevent it from effectively performing its functions. Expulsion in this context may be considered as a necessary evil and should be taken as a last resort when the gravity of the default is such that not even suspension can provide an adequate answer to the problem which it creates. However, a study of the more modern international clauses reveals that expulsion is not a normal weapon to be utilised for any and every kind of default. The best example is furnished by the United Nations Charter, which stipulates expulsion only in the event of "persistent violations of the principles of the Charter." [1] This is a distinct improvement on the Covenant of the League, which empowered the Council by a unanimous vote to terminate the membership of a State which had violated "any covenent of the League." [2] Not only the United Nations Charter but some of its Specialised Agencies provide for expulsion in the event of persistent violation only. Thus Article 4 (8) of the IRO mentions suspension by the General Council of the Organisation and expulsion with the approval of the General Assembly of the United Nations for "persistent violation of the principles contained in the Constitution." The International Bank [3] and the Monetary Fund [4] make provision for expulsion, but only after timely warning and opportunity have been given to rectify the default. Thus in the International Bank a period of one year is given for the member-State to take action with a view to its being restored to good standing, and in the International Monetary Fund withdrawal is compelled if, after the expiry of a reasonable period, the member persists in its failure to fulfil any of its obligations

[1] Article 6. [2] Article 16 (4).
[3] Article VI (2). [4] Article XV 2 (b).

under the Agreement, or if a difference of opinion between a member and the Fund under Article IV, Section 6, continues. In these monetary organisations the underlying principle is to resort to expulsion for persistent violation of the obligations to the Organisation. The other Specialised Agency of the United Nations which provides for expulsion is UNESCO.[5] It is hardly necessary to discuss the provision in UNESCO since the Organisation by itself is not empowered to exercise the powers of expulsion which are made dependent upon the action taken by the United Nations. A member expelled by the United Nations *ipso facto* ceases to be a member of UNESCO, though the latter cannot take such action on its own.

Apart from the Specialised Agencies of the United Nations mentioned above, there is the Statute of the Council of Europe which, in Article 8, provides for expulsion in the event of a violation of the fundamental principles of the organisation contained in Articles 1 and 3 of the Statute. The formula of the United Nations Charter relating to " persistent violation " has not been followed in the Council of Europe because expulsion is reserved for violation of Articles 1 and 3 only; but Article 8 provides for expulsion of any member " which has seriously violated Article 3." The emphasis is on a " serious violation " which is to be distinguished from " persistent violation." It is submitted that the United Nations formula is better because it is easily ascertainable and hence more definite as against the vague phrase " serious violation " stipulated by Article 8 of the Statute of the Council of Europe. The judge of the seriousness of a violation would be the Committee of Ministers, and there can be, very easily, grave differences of opinion on the point whether a particular violation is serious or not. However, there should normally be no two opinions on the point whether a violation is persistent.

If a scrutiny is made of the various expulsion clauses it will be found that the few constituent instruments which contain it differ on the following points:

(i) The conditions authorising expulsion;
(ii) The procedure to be followed in this regard;
(iii) The organs of the international institution which are empowered to exercise this right;

[5] Article II (4).

(iv) The permissive nature of expulsion; and
(v) The legal effect of expulsion.

Conditions Precedent

The two broad categories of conditions which must exist before expulsion is resorted to have already been stated. They are briefly (a) persistent violation of the principles of the organisation,[6] or (b) serious violation of the specific provisions of the organisation.[7] The United Nations and its Specialised Agencies incorporate the first formula of persistent violation, whereas the Council of Europe, as already stated, has adopted the second formula.

Another category is furnished by Article 26 of the European Economic Co-operation Convention and Article 16 (4) of the Covenant of the League of Nations. The former stipulates expulsion if a member "ceases to fulfil its obligations under the present Convention" and the League prescribes expulsion for violation of "any covenant of the League." This would cover any default, whether persistent or isolated and, in respect of any obligation, whether fundamental or unimportant. For example, Article 16 (4) of the Covenant of the League would cover a case of non-payment of contributions. An interpretation of this clause was made in a report submitted by the Secretary-General to the Council on March 9, 1927, to the following effect:

> "It does not appear reasonably open to doubt that the financial obligation assumed by a Member of the League under Article 6 is one of the covenants of the League and that the last paragraph of Article 16 applies formally to violation of this covenant no less than the violation of the more fundamental obligations of the Covenant. . . .
>
> "It is true that the principal object of the paragraph may be considered to be to furnish a sanction, and to protect the League, in the case of breach of one of the fundamental political obligations."[8]

This indicates the scope of Article 16 (4). However, the intention behind this provision can best be gathered from the

[6] Article 6 of the UN Charter.
[7] Article 8 of the Statute of the Council of Europe.
[8] League of Nations, *Official Journal*, 1927, p. 505 at p. 507.

British note which was circulated to the members of the League of Nations Commission and has been published in Mr. David Hunter Miller's *The Drafting of the Covenant*. The British note which comments on the provisions of Article 16 (4) in the drafting stage runs as follows:

> "A new final paragraph has been inserted to meet the case of a State which after breaking its covenant still claims to vote on the Council or the Assembly." [9]

A provision for expulsion appears to have been an inevitable corollary to the unanimity rule. If that was the intention, the clause was not introduced as a sanction or as an appropriate method of dealing with a Covenant-breaking State, as expulsion would merely be a confession of the complete inability of the League to restrain or punish illegal conduct. The intention behind Article 16 (4), therefore, appears to have been to provide a machinery for preventing a covenant-breaking State from attempting to block the entire League business by voting against all proposals under consideration. In this connection it is essential to state that the provision is purely permissive in the sense that complete discretion is vested in the Council to expel or refrain from expelling. Thus, it would be left open in each individual case whether expulsion was to be utilised as a method of outlawry or as a sanction, or kept in readiness as a mere precautionary clause to enable the League to protect itself against obstructionism by the covenant-breaking State. In accordance with the wording of Article 16 (4), there would be nothing to prevent the Council from making use of that Article in either of the above-mentioned ways.

In this connection a brief mention may also be made of the curious paradox which Fenwick has pointed out in his editorial comment in the *American Journal of International Law* (1923).[10] A member could be expelled from the League for violation of any covenant of the League but it could not withdraw until all its obligations had been fulfilled. Thus Articles 1 (3) and 16 (4) read together create a paradox by which a State had to be made to continue its membership of the League in consequence of acts for which it might be expelled from the League. The paradox

[9] Miller, *The Drafting of the Covenant*, (1928) Vol. 1, p. 417.
[10] A.J.I.L., Vol. 17 (1923), p. 516.

is easy to resolve because it depends upon the nature of the obligations in each case. For example, obligations calling for expulsion would be those which would make a State an undesirable member of the League, whereas the fulfilment of obligations attached to withdrawal would obviously not be of such a grave character as to call for the penalty of expulsion. Thus, for example, obligations under Article 12, 13 or 15 might merit expulsion, whereas failure to register treaties would not be a sufficient ground to warrant expulsion but would be an obligation which would have to be fulfilled for withdrawal to become effective. In actual fact, much should depend upon the circumstances of each individual case, the basic condition being whether it would suit the purpose of the Organisation to get rid of a member or to compel it to continue against its will as a punishment for its default.

Finally, a unique example is furnished by the International Monetary Fund which, in addition to expulsion for persistent failure to fulfil the obligations under the Agreement, also permits compulsory withdrawal in the event of a continuing difference between a member and the Fund under Article IV, Section 6. Article IV, Section 6, relates to the effect of unauthorised changes in the *par* values of currencies which appears to be a basic or fundamental provision which every member taking advantage of the Organisation is required to respect. Thus the violation of a specified provision considered by the Organisation to be mandatory is also stipulated as a condition of expulsion by the International Monetary Fund. It is submitted that in order to avoid any vagueness in the exercise of this very important power which vitally affects the existence of the member-States in any international organisation, the best system would be to particularise specific principles or provisions of the organisation which are considered mandatory, instead of employing vague words such as "persistent violation of the principles of the Organisation." There can be a substantial difference of opinion as to what a principle of an organisation is and whether a particular default of the Charter contravenes a principle or not. Thus the constitutions of the Fund and the Council of Europe in so far as they lay down certain specific provisions as fundamental, and hence as mandatory, are better drafted in this respect than those

which vaguely refer to the observance of the principles of the constitution which may be difficult to define and distinguish from the unimportant provisions of the Organisation.

Procedure

A close examination of expulsion clauses also reveals that certain procedural formalities have to be undergone before expulsion can be enforced against a member-State. In this connection it is essential that the defaulting State should be given full opportunity to explain its conduct and to make amends before this drastic action is taken against it. However, it is significant that out of the important International Organisations which provide for expulsion, only two provide an elaborate machinery for informing the defaulting member in reasonable time of the complaint made against it, and giving an adequate opportunity for stating its case before enforcing expulsion. The International Monetary Fund furnishes the most appropriate formula. Article XV, Section 2 (c), provides that in the event of a member being required to withdraw, a regulation shall be adopted to ensure that before such an action is taken the defaulting member shall be informed in reasonable time of the complaint against it, and also given an adequate opportunity for stating its case both orally and in writing. In accordance with this stipulation a by-law was adopted on March 16, 1946, which is now incorporated as Section 22 of the By-laws and Regulations of the International Monetary Fund and reads as follows:

> "Before any member is required to withdraw from membership in the Fund, the matter shall be considered by the Executive Directors who shall inform the member in reasonable time of the complaint against it and allow the member an adequate opportunity for stating its case both orally and in writing. The Executive Directors shall recommend to the Board of Governors the action they deem appropriate. The member shall be informed of the recommendation and the date on which its case will be considered by the Board and shall be given a reasonable time within which to present its case to the Board both orally and in writing. Any member so electing may waive this provision." (Adopted March 16, 1946.)

Again, the European Economic Co-operation Convention provides, in Article 26, that a defaulting member-State should be "invited to conform to the provisions of the Convention." It is only when the "said member should not so conform *within the period indicated in the invitation* that the other members may decide, by mutual agreement, to continue their co-operation within the organisation without that member. Thus a warning or notice is distinctly stipulated before action to expel is taken. However, Article 8 of the Council of Europe requires abrupt expulsion without notice or hearing, but provides for an opportunity to be given to the defaulting member to withdraw honourably before steps for expelling it are taken.

The International Bank has no elaborate machinery for expulsion, which follows as a matter of course if a member has not been restored to good standing within one year from the date of its suspension. It is, however, noteworthy that before a member is suspended, section 21 of the by-laws requires that the defaulting member should be informed in reasonable time of the complaint against it, and also given an adequate opportunity for stating its case both orally and in writing.[11] As expulsion follows suspension, and since the latter requires a certain procedure to be pursued, it follows that, in the ultimate analysis, expulsion cannot take place in the International Bank without notice or without adequate opportunity being given to the member-State to explain its case. It is submitted that the Fund formula is the most commendable, because it requires "notice" and "opportunity" for both suspension and expulsion. In addition, it also provides for examination of the case by the Executive Directors, who can only recommend to the Board of Governors the appropriate action to be taken in each case. The defaulting member is again furnished with an opportunity to state its case on the basis of the recommendations made by the Executive Directors. Thus at every stage opportunity is given to the defaulting State to explain its conduct, and it is therefore fair to say little or no room is left for any injustice to creep in or any dissatisfaction to be felt on the ground that an *ex parte* decision was taken against a member-State. It may be argued

[11] For text see Appendix. The articles of agreement are silent on the matter.

that this elaborate machinery is possible in monetary international organisations but may be extremely difficult in political global organisations like the United Nations. However, as expulsion is regarded as a " crude device " and incapable of achieving any concrete results in the international community, the units of which are States, it is submitted that the mechanism should be elaborate enough to satisfy the fundamental principles of legal procedure which are unequivocally against *ex parte* decisions.

Thus Jenks takes the view that, as the effect of expulsion is to release a State from its obligations towards other States, it affords " no real remedy for breaches of international law or of international public morality." [12] According to him it is, therefore, merely " an alibi for the failure of other States to devise effective means of enforcing the provisions which have been flouted." Again, it is likely to make vastly more difficult the integration of the State concerned into an organised international community when circumstances have changed. He, therefore, advocates that it should be adequate to empower the organisation to suspend defaulting members from all or any of their rights and privileges of membership, without thereby releasing them from any of their obligations towards the organisation. Thus the constitution of the ICAO is ideal because it empowers its Assembly to suspend the voting power of the contracting State found in default, but makes no provision for normal expulsion. Again, if some provision for expulsion is considered essential, the procedure adopted by the Fund, which requires a fresh hearing and an affirmative decision by the Board of Governors before a State declared ineligible to use the Fund is compelled to withdraw, would appear to be distinctly preferable to any other formula.

Organs Empowered to Expel

As expulsion is a very important power vested in the organisation, its exercise is scrupulously guarded by the parent organ which represents the entire body of signatory States. Thus in the United Nations Charter a member can be expelled from the Organisation by the General Assembly upon the recommendation of the Security Council (Article 6). The decision of the General Assembly would, in accordance with Article 18, require a two-thirds majority of the members present and voting.

[12] Jenks in B.Y.I.L., Vol. 22 (1945), p. 11 at p. 25.

Again, the IRO stipulates expulsion with the approval of the General Assembly of the United Nations and, in this respect, has no independent provision of its own. In accordance with Article 4 (8), the General Council can suspend a member, but expulsion is only possible with the approval of the fully representative organ of the parent organisation, namely, the General Assembly. In the International Monetary Fund, as already stated, expulsion is possible only by a decision of the Board of Governors carried by a majority of the Governors representing a majority of the total voting power. In the Council of Europe it is the Committee of Ministers which is appointed the judge of a serious violation of Article 3 and empowered to ask the defaulting member-State to withdraw under Article 7.

Similarly in the European Economic Co-operation Convention, Article 26 gives to "the other members" the right to decide "by mutual agreement to continue without that [defaulting] member." In short, therefore, it is the parent representative organ which is generally vested with the right of expulsion. The only exception to this well-observed rule is furnished by the Covenant of the League, which empowered the Council as against the Assembly to take a decision by a unanimous vote.[13] The United Nations Charter enjoins the co-operation of both the representative organs, namely, the General Assembly and the most potent organ, the Security Council, when it stipulates that the former alone can decide on the recommendation of the latter (Article 6). This probably is the most satisfactory system of co-ordinating divided functions.

The normal expulsion clause in a constituent instrument gives complete discretion to the appropriate organ to expel a defaulting member or to refrain from doing so, even though a default may be persistent or in breach of one of the basic provisions or principles of the constitution. Thus, not only the Covenant of the League in Article 16 (4) uses the words "*may* be declared to be no longer a member of the League," but even the United Nations Charter in Article 6 uses the words "*may* be expelled." Similarly, the Statute of the Council of Europe, which in the case of a serious violation of Article 8 would empower the Committee of Ministers

[13] Article 16 (4).

to expel a member, uses the words "may decide." [14] Thus all constituent instruments which stipulate expulsion make it permissive except in the case of the International Bank, where a suspended member after a period of one year automatically gets expelled. However, within that period of one year it is provided that the suspended member could be restored to good standing by a decision of a majority of the Governors exercising a majority of the total voting power. Thus in this particular case, too, expulsion can be regarded as permissive and not mandatory.

Legal Effect

The legal consequence of expulsion, which is normally an irrevocable act, is to bring to an end, with effect from the date of expulsion, all obligations of the expelled member-State to the organisation. As distinguished from suspension which, as already stated, merely puts into abeyance certain or all of the privileges of the membership, the normal expulsion clause neither intends nor provides the machinery or the method for restoration of lost membership. The effect in law of expulsion is, therefore, that, though an expelled member-State continues to be bound by the commitments which it has accepted by solemn ratification while a member (as those continue to bind it even after loss of membership), it ceases to have any relationship with the organisation after expulsion except to the extent expressly stipulated in respect of non-members. In this respect, Article 2 (6) of the United Nations Charter and Article 17 of the Covenant of the League are significant, as they attempt to bind States not members of the respective organisations. However, any outstanding obligations, particularly relating to payment of arrears of subscription of membership, would not be enforceable against a member-State after expulsion. This is a remarkable position since, whereas arrears of payments due to the organisation are recovered by the device of suspension, they are lost as a result of expulsion. There may be a strong moral right, even a legal claim, to recover arrears relating to the period an expelled State was a member of the organisation, but since there is no means of recovery from a sovereign State which has ceased to be a member, it becomes an

[14] Article 8.

unenforceable right. *Ubi jus ibi remedium* would apply, and as there is no remedy, the right to recover arrears may be said to be non-existent.

The intention, therefore, appears to be to sever permanently the relationship of the member-State with the organisation. However, it would not be quite correct to assume that expulsion invariably terminates membership on a permanent basis, because much would depend on the varying provisions of different constituent instruments. Thus a member-State of the United Nations expelled today could not revive its membership even twenty years after, unless in the judgment of the Organisation that State was "able and willing to carry out the obligations of the Charter" (Article 4). The fact of expulsion would *ipso facto* raise a presumption against its ability and willingness to carry out the obligations of the Organisation particularly when expulsion is the direct outcome of persistent violation of the principles of the Charter. Thus whether loss of membership is permanent or temporary depends upon the conditions of admission to membership of a particular international organisation. If the constituent instrument demands that a State seeking admission must display its ability or willingness to meet the obligations of the organisation, a prior expulsion would probably be fatal, unless the government of the member-State whose acts had resulted in expulsion had been overthrown, and the new government had convinced the members of the organisation of its ability and willingness to carry out the obligations associated with membership. In the Covenant of the League a much stricter formula than that of the UN was devised, when it was laid down in Article 1 (2) that any self-governing dominion may become a member, provided "it shall give effective guarantees of its sincere intention to observe its international obligations and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments." Thus a State ceasing to be a member of the League on the action taken against it under Article 16 (4) would find it difficult to give convincing guarantees of its sincere intention to respect international obligations. However, a change in government would certainly inspire confidence and, in any case, there cannot be a legal bar to re-entry under the normal admission clause so long as the necessary

majority vote stipulated for admission is forthcoming and the members are satisfied with the integrity of the applicant State. In this connection it should be pointed out that though there is no special provision in any constituent instrument for re-entry after expulsion, there is also no express bar as such to an expelled member seeking admission afresh, provided it has satisfied the necessary conditions of admission.

It is indeed interesting to note that those constituent instruments which do not provide for expulsion also do not impose conditions relating to the *bona fides* of the applicant member, as is the practice in international organisations which permit expulsion. Thus, for example, the ILO requires (*vide* Article 1 (4)) merely a " formal acceptance of the obligations of the Organisation " as a condition precedent to admission of a new member. Similarly, the FAO requires for admission (Article 11 (2)) " acceptance of the constitution as in force." This is most significant, because a presumption can be drawn to the effect that an expelled member's integrity or *bona fides* would be presumed to be in doubt and hence a specific provision is enacted, such as the " ability and willingness " clause in the United Nations Charter or the " effective guarantees of the sincere intention " as in the Covenant of the League.

In the International Bank and the International Monetary Fund the conditions of admission of new members are not specifically laid down for all time to come. Thus Article II, Section 1 (b) of the International Bank and Article II, Section (2) of the International Monetary Fund make membership open to other countries " at such times and in accordance with such terms as may be prescribed by the Fund." As in both these Organisations expulsion is possible, they have reserved to the Organisation the right to stipulate conditions in each case. Thus a study of the constituent instruments of international organisations reveals that those which allow expulsion have a cautious admission clause in contrast to those organisations which do not provide for expulsion, and this is not really surprising.

Chapter 5

LOSS OF MEMBERSHIP ON NON-RATIFICATION OF CONSTITUTIONAL AMENDMENTS

Loss of membership consequent on non-ratification of an amendment to a constituent instrument can hardly be regarded as a regular method of termination of membership. If the constituent instruments of the important international organisations of the world are examined, it will be found that very few provide for the contingency of non-ratification by a member-State of an amendment moved in accordance with the stipulated procedure. For example, apart from the United Nations,[1] no fewer than nine [2] of its Specialised Agencies have a regular amendment clause, but only one, namely, the ICAO (Article 94 (b)), provides that if any member-State has not ratified within a specified period an amendment which has come into force according to stipulated procedure, the non-ratifying State shall "cease to be a member of the Organisation and a party to the Convention, if the Assembly in its resolution recommending the adoption so provides." Furthermore, among the global organisations, the Covenant of the League furnishes the only other example. Article 26 provided that an amendment duly passed according to the stipulated procedure might be dissented from by a State, but in that case it should cease to be a member of the League. Besides these two organisations few of the military or administrative types have an amending machinery, and even if they provide for one, like the European Coal and Steel Community,[3] no provision is made for the non-ratifying State. In fact, the European Coal and Steel Community

[1] Article 108.

[2] The following nine Specialised Agencies of United Nations provide for an amending machinery but, of them, the ICAO alone stipulates for a non-ratifying member:—

Article 36	ILO	Article XX	FAO
Article 94	ICAO	Article XIII	UNESCO
Article 73	WHO	Article III	UNRRA
Article 28	WMO	Article VIII	International Bank
Article XVII	International Monetary Fund.		

[3] See Article 96.

requires ratification from each signatory before an amendment can come into force. Thus, even if there is a single non-ratifying member, the amendment cannot be enforced and hence there can be no question of termination of membership.

There are two types of amending machinery stipulated in constituent instruments. The later types of international organisations embody the United Nations formula which enables a certain fixed majority to bind the minority in the adoption of an amendment. Thus the United Nations Charter provides for an amendment to come into force when adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the members of the United Nations, including all the permanent members of the Security Council. At San Francisco, however, it was recognised that a State declining to accept such an amendment might withdraw from the Organisation. The other two examples of this purely legislative type of amending machinery are furnished by Article 36 of the ILO [4] and Article 73 of WHO.[5]

In contrast to this legislative method the amending machinery of some constituent instruments is based upon consent. The earlier types of international organisations, like the League, typify this consensual approach. The European Coal and Steel Community and the ICAO furnish further examples. Thus in accordance with Article 94 (a) of the ICAO, an amendment must be approved by a two-thirds vote of the Assembly, but comes into force only in respect of States which have ratified such an amendment. On the other hand, the Covenant of the League (Article 26 (2))

[4] Article 36 of the ILO reads as follows: "Amendments to this Constitution which are adopted by the Conference by a majority of two-thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two-thirds of the Members of the Organisation, including five of the eight Members which are represented on the Governing Body as Members of chief industrial importance in accordance with the provisions of paragraph 3 of Article 7 of this Constitution."

[5] Article 73 of WHO reads as follows: "Texts of proposed amendments to this Constitution shall be communicated by the Director-General to Members at least six months in advance of their consideration by the Health Assembly. Amendments shall come into force for all Members when adopted by a two-thirds vote of the Health Assembly and accepted by two-thirds of the Members in accordance with their respective constitutional processes."

gave complete liberty to a member to dissent from any amendment and thereby terminate its membership.

Apart from the examples quoted above of constituent instruments which base their amending machinery on the purely legislative principle or the principle of consent there are several other organisations which combine both.[6] For example, Article XIX of FAO stipulates that for all amendments which involve new obligations for member-nations, not only a two-thirds majority of the members of the Conference is essential together with acceptance by two-thirds of the member-nations, but also the amendment shall come into force for " each member-nation accepting the amendment." However, in accordance with Article XIX (1), for other amendments a majority vote of two-thirds of the votes cast suffices to bring them into force. As between amendments which involve " new obligations " or, as UNESCO [7] would have it, involve " fundamental alterations " and those which are ordinary amendments, a distinction has crept into several constitutions of the Specialised Agencies. For example, Article XVII of the Fund and Article VIII of the Bank and Article III of UNRRA are all based on this distinction between the more important and hence fundamental types of amendment which involve new obligations, as against those which are simple by nature.

In the light of the foregoing analysis of the various types of amending machinery, it is safe to say that the question of termination of membership on non-ratification arises only in respect of those international organisations which rely on the purely legislative principle. For example, organisations which require the assent of each member before an amendment of an important nature can be brought into force do not anticipate a need to terminate the membership of a non-ratifying member-State. It is only when it is necessary to enforce an amendment imposed by a majority that a dissenting State which refuses to ratify becomes fundamentally at variance with the international organisation

[6] The following organisations combine both principles:—

FAO	Article XIX
UNESCO	Article XIII
International Bank	Article VIII
International Monetary Fund	Article XVII
UNRRA	Article III

[7] Article XIII.

of which it is a member. If the amending machinery specifically provides for the contingency of non-ratification, the procedure laid down obviously has to be followed. However, as has already been stated, there are only two organisations—of which one, the League of Nations, is defunct—which provide for the contingency of non-ratification by a member-State. Thus in a large majority of cases, there is no provision for the non-ratifying member, and consequently the problem, which is dealt with in the succeeding chapter, merits careful examination.

In the present context, however, it will suffice to say that an unacceptable amendment, even though moved and passed in accordance with the agreed provision of the constitution, raises a fundamental difference of opinion between the organisation as amended on one side and the dissenting member-State on the other. The position so created leads to a conflict or rights. There is not only the question of the right of the organisation to expel the State refusing to accept the amended constitution, but there is also the corresponding right, considered by some jurists to be inherent in the sovereignty of the member-State, to withdraw from the organisation which has been amended without its consent, and possibly in the fact of its active opposition and is, therefore, something different from the one which it had originally accepted. Whether such a demand is strong or weak, or is legally justified in view of the acceptance by the non-ratifying State of the amending machinery, is discussed in more detail in the subsequent chapter.

Part Three

WHERE NO CONSTITUTIONAL PROVISION IS MADE

WHEN a constituent instrument makes no provision for termination of membership, the legal position has to be determined in accordance with general customary international law. It is useful, for the purpose of clarification, to classify the various methods of termination into three broad categories, namely,

(i) those available to the organisation;
(ii) those available to the member-States; and
(iii) that which is available to both.

In the first category come suspension and expulsion—powers which cannot be exercised unless they are expressly conferred on the organisation. In the second category come (a) withdrawal; and (b) termination by mutual consent. The former is a right exercised by the member-State against the organisation and is mentioned in the constituent instrument if it is abrogated, modified or regulated. Again, revision, modification and termination of a constituent instrument by mutual consent are always available to the member-States even if the instrument is silent. In the third category comes termination of membership consequent on non-ratification of amendment to the constituent instrument. This is typified by Article 26 of the Covenant of the League. When a member-State refuses to ratify an amendment to the constitution of the organisation even though it has been duly passed according to prescribed procedure, that dissenting State has the right to withdraw even though the organisation may by express provision acquire the right to expel it.[1] Thus if the constituent instrument provides for expulsion or at times stipulates non-ratification of amendment by a member-State as a cause for termination of membership, the organisation has the right to

[1] This is a controversial point which is dealt with more fully below.

expel the dissenting non-ratifying State.[2] Moreover, if the constituent instrument is either silent on the point of withdrawal or stipulates a procedure for withdrawal, the non-ratifying member-State has always the right to withdraw according to the stipulated procedure or to exercise the inherent implied right of withdrawal in the absence of any specific prohibition.[3] It is clear that loss of membership as a result of non-ratification of an amendment can result either from the act of the member-State or from the act of the organisation.

Two general observations may be made. First, it is significant that whereas suspension and expulsion in category (i) above have to be expressly stipulated in order to be available, the methods mentioned in categories (ii) and (iii) above need not be specifically provided in the constituent instrument and would be available to the member-State in the absence of express abrogation : the members being sovereign are thus in a stronger position than the organisation.

Secondly a treaty may provide for all three methods of termination—which is very rare—or only two, as is witnessed quite often, *e.g.*, expulsion and suspension in the United Nations Charter, or withdrawal and expulsion in the Covenant of the League, or even one only as, for example, withdrawal in the Bogotá Charter. There are also instances where none of these methods is contemplated, except revision at the request of a majority of signatory States as in the Danube Convention of 1948. Nevertheless, although expulsion and/or suspension may have been specified in a constituent instrument, the other methods in categories (ii) and (iii) cannot be *ipso facto* ruled out. It would not be correct to apply the maxim *expressio unius est exclusio alterius* and hold that if a constituent instrument expressly mentions suspension/expulsion, other methods are impliedly ruled out. It is

[2] For example, Article 94 (b) of ICAO reads as follows: " If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organisation and a party to the Convention." Again, Article 26 (2) of the Covenant of the League stipulates as follows: " No such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League."

[3] See Chap. 6.

true that both withdrawal and expulsion are possible alternative methods of terminating membership, but there is a fundamental difference between the two. Whereas the right of withdrawal is with the member-States, expulsion is a right expressly vested in the international organisation. Thus the two means of bringing membership to an end are not alternative; for the same entity cannot exercise the option of electing to adopt one or the other. However, it will be necessary to pursue the question at greater length since the analysis is complicated by the presence in some cases—such as the United Nations Charter—of a suspension clause in addition to an expulsion clause. Furthermore, the interpretation of the relevant instrument depends not only upon the intention of the parties in so far as this may be discoverable, but also upon the constitutional principles which lie at the root of international organisations.

Chapter 6

SUSPENSION, EXPULSION, WITHDRAWAL

The legal effect of the absence of a suspension clause or expulsion clause must be considered separately since it relates to the powers of organisations—unlike the right of withdrawal, which appertains to the powers of a member, and which is independent of the express terms of the instrument. The problem will be approached systematically as follows :

(1) a summary of the position in respect of suspension and expulsion;
(2) an examination of the legal effect of absence of a withdrawal clause;
(3) a discussion of revision by mutual consent which is always available whether or not specified in a constituent instrument.

Where no Provision for Suspension or Expulsion Exists

It is a well-established principle of international law that where a constituent instrument is silent in respect of the first category, there is no inherent right vested in the organisation either to expel or suspend a member-State. As consent is the basis of all international obligations, an organisation would have no right to take action against a member-State in the absence of express agreement by the signatory States.

The only possible exception is when a member-State persists in retaining its membership while refusing to ratify an amendment to the constitution of the organisation, even though the same is passed in accordance with the procedure for amendment laid down in the constituent instrument. In the absence of a specific provision empowering the organisation to expel a member-State, it would probably be sound to presume that the organisation would have the option to terminate the membership of the non-ratifying State or to hold it bound by the original unamended constitution only, and allow it to continue as a member. The former alternative is doubtful and it is impossible to express a firm view on the point. However, the latter alternative represents

an accepted position as both the IRO (Article 16)[1] and the FAO (Article XIX) [2] provide that even after two-thirds of the member-States have ratified the amendment, the remaining one-third will be bound by new obligations on the acceptance of the same by each one of them. This is strictly in accordance with customary international law on the subject and needs no elucidation.

It is doubtful, however, if the organisation can expel a non-ratifying member-State in the event of its insisting to continue as a member when the organisation has no express power of expulsion. There is no authority on this controversial point except the principle of customary international law that a State is bound to the extent of express consent only—which would prevent the organisation from exercising any right of expulsion. As against this, there is the organisational *cum* constitutional principle that if a State has accepted a machinery of amendment and yet does not ratify an amendment duly passed in accordance with that machinery, the legal effect is to alter the constitution of the organisation, and as the dissenting member has not consented to the new organisation, it must cease to be a member. This must be the legal presumption in the event of a constituent instrument providing machinery for amendment but failing to provide for the contingency of its non-ratification by a member-State.

Thus with the above possible exception, there can be no question of a presumption in international law in favour of the organisation exercising any power to suspend or expel a member-State in the absence of a specific provision to that effect. This legal position is essentially based on the fundamental rule that nothing binds a member-State which is not expressly stated in a constituent instrument.

Where no Provision for Withdrawal Exists

The inevitable logical corollary of the above principle is that anything which is not conceded in favour of the international

[1] Article 16 of IRO reads as follows: "Amendments shall come into effect when adopted by a two-thirds majority of the members of the General Council present and voting and accepted by two-thirds of the members in accordance with their respective constitutional processes, provided, however, that amendments involving new obligations for members shall come into force in respect of each member only on acceptance by it." A similar provision exists in the WMO, *vide* Article 28.

[2] See Appendix.

organisation is retained by the member-State, which by virtue of its sovereignty must be vested with the residuary jurisdiction. This must clearly be the position, particularly when international organisations are at most confederal in character and come nowhere near a federal concept. Thus States have claimed an inherent right of withdrawal arising out of the principle of sovereignty or of democracy or equality, and have contended that this right exists wherever it has not been expressly barred or expressly modified. In the latter event, the signatories, having expressly agreed to a curtailment of their sovereignty, would be bound by the exact terms of the withdrawal clause of the constituent instrument concerned. Hence, under the Covenant of the League a member-State was obliged to give two years' notice of withdrawal in accordance with Article 1 (3) and to fulfil all its international obligations as well as those under the Covenant before actually withdrawing. The inherent right of withdrawal, assuming that it exists, is modified to that extent as a result of the consent given by the member-State to the particular procedure declared in the treaty.

However, the extent to which the inherent right of withdrawal can be admitted in the absence of an express stipulation is a controversial point in international law. The two apparently rival theories may be briefly stated as follows :

The Theory of Sanctity of Treaties

The first approach to the subject, which is backed by several authorities, is, in the words of Lord McNair (as he now is), that " a treaty is intended to be of perpetual duration and incapable of unilateral termination, unless, expressly or by implication, it contains a right of unilateral termination, or some other provision, for its coming to an end." [3] This viewpoint is supported by the Harvard Research which, while accepting this principle of international law, has stated in Article 34 that " a treaty may be denounced by a party only when such denunciation is provided for in the treaty or consented to by all other parties. A denunciation must be in accordance with any conditions laid down in the treaty or agreed upon by the parties." [4] Hackworth and

[3] *The Law of Treaties* (1938), p. 351.
[4] Article 34 of Draft Convention of the law of treaties, A.J.I.L., Vol. 29, Suppl. 604. Briggs, *The law of Nations* (2nd ed. 1953), p. 914.

Hyde support this contention by using words to the same effect.[5] Lawrence and Hall as well as, recently, Dr. Schwarzenberger, have brought out the same principle emphatically, and pointed out that "once States enter into treaty obligations the presumption is that they have created amongst themselves a *lex contractus* of a permanent character."[6] It follows that, failing special provisions to the contrary, "the change in termination of an international treaty depends on the consent of the contracting parties and if unilateral amounts to a breach of the treaty."[7]

Not only legal theory but international practice, too, has confirmed the above view.

When the question had arisen whether the United States of America had a right to terminate unilaterally the Clayton-Bulwer Treaty of 1850, the following opinion was given by Sir Edward Herslet, whom Lord McNair regards as "an authority of value on the subject of treaties."[8]

> ". . . but without pursuing that point any further the question may now be asked whether the United States have a right to terminate the Clayton-Bulwer Treaty simply by giving a notice of their desire to do so, or by passing an Act of Congress with that object. It appears to me that they have not, (1) because there is no clause in the Treaty to which they can appeal as giving them a right to do so; (2) because the President of the United States in 1857 admitted that the proper course to put an end to a treaty which was found objectionable was to abrogate it by 'mutual consent'; and (3) because on other occasions, when treaties have been endeavoured to be abrogated by foreign Powers, when no such right was reserved to them to do so by treaty, the British Government has maintained that they could not be abrogated except by mutual consent. Such was the case with Venezuela when in 1841, 1843, and

[5] Hackworth, *Digest of International Law*, Vol. V (1942), pp. 307–318. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. II (2nd ed. 1945), pp. 1517–1521.

[6] Lawrence, *The Principles of International Law* (6th edition, 1915), pp. 43–51 and 326–330. Hall, *International Law* (8th edition by Pearce Higgins, 1924), pp. 379–400.

[7] Schwarzenberger, *International Law*, Vol. I (2nd edition, 1949), p. 197.

[8] McNair, *op. cit.*, p. 355.

again in 1879 that country gave notice of its desire to terminate the Treaties of 1825 and 1834, but the British Government on each of those occasions declined to accept the notices, and denied the right of the Venezuelan Government to terminate them." [9]

Similarly, when the Tsar of Russia wanted to abolish the régime which was made applicable to Batoum by Article 59 of the Treaty of Berlin in 1878, the British Government protested on the ground that the Article was an integral part of the Treaty and could not be denounced unilaterally. In 1886, Lord Rosebery, who was the then Secretary of State for Foreign Affairs, wrote to Sir R. Morrier, the British Ambassador at St. Petersburg, "one direct, supreme, and perpetual interest, however, is no doubt at stake in this transaction—that of the binding force and sanctity of international engagements. Great Britain is ready at all times and in all seasons to uphold that principle, and she cannot palter with it in the present instance." [9a] The view of the United States Department of State has been identical: in a Memorandum of December 20, 1925, a categorical opinion was expressed to the effect that "there is no implied right in any one party to a treaty to withdraw therefrom at will in the absence of a specific provision for such withdrawal by denunciation or otherwise or unless another party to the treaty has violated it so substantially as to justify its termination."

Constitutional theory governing International Organisations

As against this considered opinion of jurists, supported by diplomatic practice, stands the rival theory which affirms the right of denunciation to a sovereign member-State. Thus, in 1926, at a conference of signatories of the Statute of the Permanent Court of International Justice, the Czechoslovak delegate, M. Osusky, stated that "any State, having adhered to an international convention like the Statute of the Court, had a right to withdraw its adhesion—that was an elementary principle of common law," that the Statute "was an international convention and that every international convention of the same type as the Statute of the Court implied the right of denunciation, even if no

[9] Cited by McNair, *op. cit.*, p. 355.
[9a] *Ibid.*, p. 356.

formal provision were made for it." [10] Again, M. Henri Rolin, of Belgium, significantly stated in the same context that " a large number of delegations had made formal reservations with regard to the principle, which indeed had been somewhat too definitely stated, that international treaties might be denounced unilaterally." [11] In discussing the United Nations Charter in relation to an inherent right of withdrawal, the learned editor of the eighth edition of Oppenheim's *International Law* states " although the Charter itself does not expressly mention the right of withdrawal, in the absence of an express prohibition to that effect the members of the United Nations must be deemed to have preserved the right to sever what is, in law, a contractual relation of indefinite duration imposing upon States far-reaching restrictions of their sovereignty." [12] This supports the contention of the Soviet delegate, Mr. Gromyko, at the ninth Plenary Session of the San Francisco United Nations Conference on International Organisation, who stated in June, 1945, that " the opinion of the Soviet Delegation is that it is wrong to condemn beforehand the grounds on which any State might find it necessary to exercise its right of withdrawal from the Organisation. Such right is an expression of State sovereignty and should not be reviled, in advance." [13] It is not necessary here to enter into any detailed examination of a particular charter or constitution of an international organisation, because the discussion is of a general nature and in respect of a broad-based theory, irrespective of exceptions and limitations which may be found to exist on an examination of particular constituent instruments. Thus, before examining individual constitutions, it is first essential, when apparently contradictory views have been held on the subject, to clarify the legal position in relation to withdrawal.

[10] Minutes of the Conference of States Signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, held at Geneva, Sept. 1-23, 1926. League of Nations, 1926, 26, pp. 12-13.

[11] League of Nations, 1926, 26, p. 18.

[12] Oppenheim, *op. cit.*, Vol. 1, p. 411.

[13] Verbatim Minutes of the 9th Plenary Session, June 25, 1945, UNCIO Document 1210 P/20. United Nations Information Organisation, Documents of the Conference, Vol. 1, p. 619. For discussion of withdrawal in Committee 1/2 of Commission 1, see *ibid.*, Vol. 7, p. 262 (Document 1086), for Committee's decision see, *ibid.*, Vol. 7 p. 577 (Document WD 344): for the Report of the First Commission on Withdrawal, see 5th Meeting, *ibid.*, Vol. 6, p. 206 (Document 1187).

The Approach to be Adopted

It is submitted that this tangle of conflicting opinions of jurists in regard to the statement of legal theory and of diplomats in regard to international practice can be resolved by a clear appreciation of the different types of treaty that exist. If once it is recognised that the answer to the question whether unilateral withdrawal or denunciation is possible depends upon the nature and the character of the treaty concerned, the solution that emerges is not only consistent with law and logic, but is the only possible approach to this intricate and yet vital subject of international law. As already stated, from the viewpoint of this study, there are two broad categories of international treaty, namely, (1) those which give birth to international organisations and (2) those which involve international obligations and commitments but do not establish international organisations. It will be appreciated at the very outset that the former class of treaties would be governed by the theory and principles or organisation of institutions, and the latter by the general principles of international law on the subject. Thus the question of unilateral withdrawal in treaties which establish international organisations depends upon the basic organisational or constitutional principle of residuary jurisdiction which is always with the sovereign member-State. However, in the case of the large category of other treaties which are non-organisational in pattern, the well-known maxim of international law *pacta sunt servanda* is always applicable. It would be unsound to reason only in terms of *pacta sunt servanda* in that sphere of treaties which must be governed by the constitutional *cum* organisational principle, for there is a special rule of law applicable in this particular sphere, which excludes the application of a general maxim of international law on the analogy of *generalia specialibus non derogant.*

Thus, in the absence of a specific provision, there can be no question of the violation of the sanctity of a treaty in the event of unilateral withdrawal, when the accepted principle supported by practice and convention is that (a) a sovereign State is only bound to the extent to which it has consented in a treaty and, therefore, cannot be legally held to be bound by anything which is absent from a treaty; and (b) in particular, the right of withdrawal, when required to be limited or regulated by a certain

procedure, or made conditional on discharge of certain obligations, needs to be expressly mentioned in the constituent instrument inasmuch as a sovereign State cannot be bound by a procedure or condition to which it has not agreed. It is significant that two-fifths of the treaties registered with the Secretariat of the League of Nations up to 1935 contained articles modifying or limiting or prescribing a procedure for denunciation.

There is no international constituent instrument which merely mentions withdrawal with a view to recognising the right of the member-State in this respect. Whenever a withdrawal clause is mentioned in a constituent instrument, it is invariably with a view to regulating the procedure for withdrawal. The serving of a simple notice which is the barest provision for withdrawal and is witnessed in the International Bank and the International Monetary Fund must also be regarded as a stipulation prescribing a procedure rather than recognising a right. In the circumstances, if any restrictions have to be placed on the right of withdrawal by way of notice or otherwise, it is necessary to insert provisions to this effect in the constituent instrument. If this is not done, the residuary jurisdiction rests with the member-State since the latter is bound to the extent of express consent only. Thus, in the absence of an express stipulation in a constituent instrument, it may be rightly presumed that the international organisation so created does not put any limitation on the right of the member-States to withdraw. To clarify this submission it can be said that the true test is to be found by inquiring how best the draftsman of an international constitution could prohibit the exercise of the right of withdrawal by member-States. Would he be able to achieve his objective by keeping silent on the point of withdrawal or would he achieve it by expressly prohibiting it in the constituent instrument and obtaining the consent of the members to the same? The answer is obviously the latter. It is indeed elementary that the rule *pacta sunt servanda* can only apply to an express stipulation of a treaty for there can obviously be no violation of a provision which does not exist. It could, however, be argued that a treaty which establishes an international organisation is like any other international instrument in this respect and unilateral withdrawal is akin to unilateral denunciation. However, as already stated, to apply a general principle of

international law regarding sanctity of treaties to the special category of constituent instruments is to undermine the more fundamental principle of organisation which must apply with greater force in its own sphere. The reason is obvious, because when a constituent instrument ranks as the charter of an organisation, the appropriate constitutional principle must be applied to determine what is an undertaking of a member-State and to what extent it is bound before applying any other maxim of law to hold it guilty of violation. So, in the absence of a specific undertaking or commitment on the part of the member-State, there could be no question of violation of a provision of a solemn treaty.

Thus the opinion which Judge Lauterpacht has expressed is sound in the context of the law relating to international organisations. What Lord McNair has stated regarding the perpetual sanctity of treaties is indeed correct with reference to those law-making treaties (*traités-lois*) which are not organisational in pattern—*e.g.*, the Kellogg-Briand Pact of 1928, or, say, the Geneva Conventions of 1949. It is of the very essence of a purely law-making treaty that it should be perpetually observed by all signatories and unilateral denunciation could not be warranted at any stage. If a procedure was laid down for the denunciation or termination of a law-making treaty, it would obviously have to be followed, but, in the absence of any regulation on the subject, unilateral denunciation would be tantamount to violation of a solemn treaty. This clearly indicates the cardinal distinction between treaties which give birth to international organisations and those which do not. The former are governed by a separate set of principles, and this must inevitably be so because, whereas one becomes the constitutional charter of the organisation, the other merely enunciates a general legal principle of international law to be observed by States in their intercourse. Thus unilateral withdrawal in relation to an organisation must be treated on a footing different from unilateral denunciation of a treaty. There can, of course, also be unilateral denunciation of a constituent instrument when a member-State violates its provisions and withdraws or acts in violation of its express terms, but not otherwise.

It may be argued that if a constituent instrument contemplates a permanent universal international organisation, it takes the

nature of a *traité-loi* and, therefore, withdrawal amounts to denunciation and may be presumed to be forbidden. It is submitted that this is not the correct approach : even if an international organisation is conceived as a permanent global body, individual members may legally withdraw unless the door is closed by expressed stipulation.

The Position in WHO and UNESCO

It is true, however, that international practice in the case of UNESCO and WHO has supported the contention that, where there is no withdrawal clause, the right to withdraw ceases to exist. In brief, the situation is as follows :

The WHO does not have a withdrawal clause following the precedent of the United Nations Charter. Although there have been no actual withdrawals from the UN, the Soviet Union and the Ukrainian Soviet Socialist Republic communicated their intention to withdraw from the WHO in February 1949.[15] In 1950, the People's Republic of Bulgaria, the People's Republic of Rumania, the People's Republic of Albania and the People's Republic of Czechoslovakia communicated a similar intention of withdrawing from that Organisation. The World Health Assembly resolved in May 1950 that, while the WHO would always welcome the resumption by these members of full co-operation in the work of the Organisation, " it was not considered that any further action at that stage was desirable." [16] A similar problem arose in UNESCO when Poland, Hungary and Czechoslovakia [17] intimated that they no longer considered themselves as members of the Organisation.[18] However, the opinion is held that as there is no withdrawal clause the members cannot be deemed, in law, to have withdrawn and the Organisation, therefore, regards them as having remained members liable for the payment of subscriptions and other financial obligations. All three States have recently

[15] See Official Records of WHO, No. 17, April 1949, pp. 19, 52, 53.

[16] Resolution WHA, 3. 84 Official Records of the World Health Organisation No. 28, p. 52.

[17] On April 5, 1955, the South African Minister of External Affairs announced that South Africa had decided to withdraw from UNESCO: Keesing's *Contemporary Archives*, April 2–9, 1955, p. 14135.

[18] Poland on December 5, 1952, Document 72 Resolutions January 7, 1953, p. 8: Hungary on December 31, 1952: Czechoslovakia, January 29, 1953, Document 33 Ex Decisions May 7, 1953. See also 2c 6.

intimated their intention to renew active participation.[19] Thus in WHO the system of two budgets is introduced, and the withdrawn members are shown as in arrears in the payment of their financial obligations to the Organisation which is supposed to be the *de jure* budget as against the actual or *de facto* budget which gives the position without the withdrawn members.[20] On July 4, 1958, the following resolution was adopted in UNESCO : " Hoping that UNESCO will continue to adhere to the principle of universality of membership but recognising that withdrawal may at times become inevitable involving certain serious financial problems in drawing up the bi-annual budget of the Organisation, this general Conference requests the Director General and the Executive Board to consider the matter of withdrawal from the Organisation, and, if appropriate, draft amendments to the Constitution to provide for such withdrawal." [21]

Following the Report of the Administrative Commission to the 1954 Conference (which accepted the principle of unilateral withdrawal,[22] and adopted the Report of the Legal Committee [23]), the General Conference of 1954 adopted an amendment to Article II of the Constitution and inserted a withdrawal clause.[24] Poland, Hungary and Czechoslovakia, at this Conference, submitted requests for facilities for payment of arrears by instalments and such facilities were granted in the case of Poland for the years preceding 1958, and similarly to Czechoslovakia and in the case of Hungary for the years preceding 1954.[25] These States contended that they were not liable to contributions during the period of withdrawal, but this contention was not accepted. Hungary eventually conceded her obligation to pay arrears, but Poland and Czechoslovakia reserved their rights for the year 1958.[26] But

[19] Poland, May 1954, Czechoslovakia, September 1954; Hungary, October 1954; see UNESCO Bulletin Vol. 6, No. 4.

[20] WHO Official Records 35, pp. 47–49. WHA. 4.71–4.74: *idem*, pp. 272–273.

[21] Resolution 9. 3. For other Resolutions see *re* Poland, December, 11, 1952, II 0. 13; Hungary, July 3, 1952. II 9. 1, and 9 II. and 9. 12; Czechoslovakia, July 3, 1953, 11 9. 2. 9. 21 and 9. 22.

[22] UNESCO Docs. Resolutions 1954, Annexe 2.

[23] See Document 8C/JUR/1: in effect the Committee merely drafted an amendment.

[24] See Appendix UNESCO Constitution Article 26 for text and Resolution II. 1. 1. 1954.

[25] Resolutions V 1. 5, V 1. 511, V 1. 512, V 1. 521, V 1. 522, V 1. 53, V 1. 532.

[26] It would seem that UNESCO only conceded that a withdrawal clause was desirable but did not concede that the States concerned had effectively withdrawn.

all three States were allowed full voting rights on renewing participation at the 1954 Conference.[27] It is submitted that the legitimate contention of the withdrawn members could be that, since they have not violated any provisions of the Organisation and have withdrawn in accordance with their right to which no limitation or fetters had been placed by virtue of their ratification of the constituent instruments of WHO and UNESCO, they were not bound in law to pay any subscription after they had served their notice of withdrawal. If this is the correct position —and it is submitted that the approach to the problem must be first and foremost from the organisational or constitutional viewpoint—the contention of Kelsen " that a member withdraws from the organisation means that a State terminates, in relation to itself, by unilateral act the binding force of a treaty " is not quite correct.[28] In the absence of a specific provision a member-State could withdraw on any ground whether unreasonable or reasonable. As a State cannot be bound without its express consent, the binding force of a treaty is dependent upon what is expressly stipulated in the constituent instrument and not what is assumed by a member-State, particularly on a point where international practice requires a stipulation whenever it is deemed necessary to limit the right of withdrawal. In this particular respect, the delegate of the United States, at the 28th meeting of Committee 1/2 of Commission I of the San Francisco Conference, had declared that " in an organisation of sovereign States, it was clear that all Members would possess the faculty of withdrawal." [29] He contrasted such an organisation with a federal union, the members of which did not have the faculty to withdraw. " The Charter of the Organisation should state what rights the Organisation possessed. It need not state what rights the members possessed." Thus if any fetters had to be placed on the member's right to withdraw, the same should be expressly stipulated. If this is so it is misleading to contend as Kelsen does, that " if sovereignty implies the inalienable right of withdrawing from the organisation established by an international treaty to which a State is the contracting party, then sovereignty means

[27] See Resolution cited under note 25 above.
[28] Kelsen, *The Law of the United Nations* (1950), p. 123.
[29] UNCIO Doc. 1086: United Nations Conference on International Organisation, Documents, Vol. 7, p. 265.

that a sovereign State is bound by a treaty to which it is a party only as long as it pleases. Sovereignty in this unrestricted sense of the term is incompatible with any idea of International Law binding upon the States." [30] It is submitted that a more accurate statement of the position would be that if a sovereign State, after expressly agreeing to a clause prohibiting withdrawal in a constituent instrument, proceeds unilaterally to withdraw from it, there would of course be a clear violation of a solemn treaty but not otherwise.

It is surprising that the learned author should have made the above statement in a context where he is fully alive to the fact that when the charter of an organisation does not confer on any of its organs the competence to decide a question, " any member is authorised to decide that question for itself." [31] These observations are made by Kelsen in discussing the exceptional circumstances permitting withdrawal from the United Nations mentioned in the Commentary of Committee 1/2 of the San Francisco Conference. The question is raised who is competent to decide when these exceptional circumstances exist? Kelsen rightly answers it by stating that " since the Charter did not confer this competence upon a special organ any member is authorised to decide the question for itself." In support of this contention is the view expressed by Mr. Miller in 1919 when he submitted to the American Senate a Memorandum on the interpretation of the withdrawal clause of the Covenant of the League of Nations. It was then urged by some that Article 1, paragraph 3, of the Covenant permitted the right of withdrawal to be determined by some organ of the League of Nations and that it did not leave the matter of withdrawal entirely within the competence of the State desiring to withdraw. Mr. Miller cleared the doubt by pointing out that such a contention was entirely unfounded.[32] He stated :

> " It is impossible to discover any foundation for the argument advanced that in some way the Council of the League (or the Assembly) would have jurisdiction to pass upon the question of withdrawal. To exist, such jurisdiction

[30] Kelsen, *op. cit.*, p. 126.
[31] Kelsen, *op. cit.*, p. 123.
[32] 58 Congressional Record, 66th Congress, 1st Session, August 4, 1919, p. 3605.

would have to be expressly conferred. No such jurisdiction is mentioned or even implied in the Covenant. The right of withdrawal is given to each member of the League in its own uncontrolled discretion as not even a reason for withdrawal need be alleged."

It is also significant that President Wilson, while explaining the withdrawal clause in the Covenant of the League, expressed the same view by pointing out that the State giving notice of withdrawal would be the sole judge of whether or not it had fulfilled international obligations and its obligations under the Covenant.[33] His contention was purely based on the correct constitutional concept of international organisations that nothing binds a State to which it has not expressly consented. The Wilsonian interpretation in this particular case may carry the principle of residuary jurisdiction a little too far, but one does not dispute that an important item like withdrawal would require an express stipulation if it had to be barred or modified. To presume that withdrawal was barred by a constituent instrument on the sole ground of the absence of a withdrawal clause would be to proceed on a false hypothesis. "The right of a State to terminate a treaty must not be confused with its power to effect such an achievement. Exercise of the right whenever it is found to exist can never afford just ground of complaint. Exercise of the power is to be regarded as lawful only when it is within the limits of the right."[34] It is submitted that the exercise of the power to withdraw from an international organisation which does not bar or regulate withdrawal would be clearly lawful as it would be within the right of a sovereign State so to act when it has not undertaken to refrain from doing so. This is particularly true in respect of a constituent instrument, though the same may not be the position in respect of a law-making treaty which is other than a treaty establishing an international organisation and is intended to be of perpetual duration like the Hague Conventions.

The Position in the United Nations

The Dumbarton Oaks proposals contained no provision for withdrawal though the intention was to establish a permanent

[33] Conference at the White House, August 19, 1919. See *The Senate and the League*, by Henry Cabot Lodge, Appendix 4, pp. 297, 309, 377.

[34] Hyde, *International Law Chiefly as Interpreted and Applied in the United States*. Vol. II (2nd ed., 1945), p. 1516.

international organisation. The weakness of the League's Covenant was sought to be avoided by a deliberate omission of the provision of withdrawal. It is difficult to understand how recalcitrant members were to be prevented from withdrawing in the absence of a specific provision prohibiting withdrawal. It is indeed significant that this fundamental misconception should exist as to the means appropriate to the end. However, Committee 1/2 of the San Francisco Conference was in no doubt about the true legal position. Although it voted against the insertion of a withdrawal clause in the Charter, it clearly gave its opinion in the following text, which forms part of its report to Commission I: "The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organisation. The Committee deems that the highest duty of the nations which will become Members is to continue their co-operation within the Organisation for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organisation to compel that Member to continue its co-operation in the Organisation. It is obvious, particularly, that withdrawals or some other forms of dissolution of the Organisation would become inevitable if, deceiving the hopes of humanity, the Organisation was revealed to be unable to maintain peace or could do so only at the expense of law and justice. Nor would a Member be bound to remain in the Organisation if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect. It is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically forbidding or permitting withdrawal." [35] The only comment on the three exceptional circumstances mentioned above is that once the inherent right of withdrawal is conceded, not only

[35] Kelsen, *op. cit.*, pp. 122–123. UNCIO Document WD 344; UNCIO Documents of the Conference, Vol. 7, p. 577.

does the member-State become the sole judge of the reasons justifying withdrawal, but no legal complaint is permissible if withdrawal is sought even on the flimsiest ground possible. No useful purpose would be served by examining here in detail the various exceptional circumstances mentioned in the Commentary, even though the entire Commentary was included in the Report of Commission I to the San Francisco Conference, because there is nothing to indicate that this can be legally regarded as constituting the intention of the Parties which were signatories to the Charter.[36] Although the Plenary Session which approved the Report of Commission I voted on the Charter and the Statute of the International Court of Justice, it refrained from voting on the Report which contained the Commentary on withdrawal. Again, the Soviet delegate expressed his dissent from certain statements in the Report and his dissenting minute was attached to the record of the Plenary Session. In short, there was no voting on the Report, and even if it is taken as tacitly agreed to, the fact remains that it was not unanimously approved. Moreover, it can be argued that as the Report of the First Commission, including observations on the right of withdrawal, is not a part of the Charter, it is devoid of legal effect. The Commentary was not inserted in the text of the Charter, nor in another treaty, nor in an additional protocol, nor formulated as a reservation. It could, therefore, be disregarded, although it must be pointed out that the Committee's statement was approved by the Conference in plenary session.[36a]

Whatever may be the exact legal value of the Commentary it is indeed of considerable significance that the general position relating to withdrawal should have been made quite clear by the Rapporteur of Commission I in the meeting of the Commission on June 23, 1945, when he introduced the Commentary with the following observation: "The Commission does not recommend any text on withdrawal for inclusion in the Charter. However, the absence of such a clause is not intended to impair the right

[36] Kelsen, *op. cit.*, p. 123. Kelsen has examined at length the three "Exceptional Circumstances" and one may wholeheartedly agree with his observations. However, it is difficult to agree with him in respect of the right of withdrawal from United Nations being barred by Articles 2 (6) and 39 of the Charter. This aspect is examined in detail in this Chapter.

[36a] See also Goodrich and Hambro, *Charter of the United Nations* (1949), pp. 143–145. UNCIO, Vol. I, pp. 616–617, 619–620.

of withdrawal, which each State possesses on the basis of the principle of the sovereign equality of the Members." [37] It is indeed of little consequence whether it is sovereignty or equality or democracy which lies at the root of the residuary jurisdiction which the normal " International Person " possesses as a member of an international organisation. That the residuary jurisdiction is vested with the member-State and that the right of withdrawal derives from such residuary jurisdiction unless stipulated to the contrary are nowhere in dispute.

In the light of the above observations, Kelsen's comment on the Soviet Delegation's statement on withdrawal and Article 17 of the Soviet Constitution does not appear to be based on the correct appreciation of the application of the principles of constitutional law in the national and international spheres. The contention of Kelsen is that the right of withdrawal as an expression of the member's sovereignty is not confirmed by reference to Article 17 of the Soviet Constitution as the Soviet delegate would have it. To quote Kelsen, " The fact that the Constitution of the Soviet Union contains an express provision conferring upon the members the right to secede is an argument against the doctrine that this right is an expression of sovereignty. If it were, no express provision conferring such right would be necessary; that the provision of Article 17 has been inserted into the Constitution of the Soviet Union shows that the authors of the Constitution were of the correct opinion that such an express provision is necessary in order that the Members have the right to secede. This right is not a consequence of their sovereignty; the Members have it because it is conferred upon them by the Constitution to which they are subjected and, consequently, are, as parts of a State, not sovereign." [38] It is submitted that as the sovereign right to secede unilaterally is as a rule not conceded in federal constitutions, the Soviet Constitution following the correct practice had naturally to provide expressly for it. However, the principles which govern a federation cannot apply to a confederal structure. In the latter category the right of withdrawal is reserved to the member-States and an express stipulation in such an organisation would not be necessary. If that is the correct

[37] Verbatim Minutes of 5th meeting of Commission I, UNCIO Doc. 1187, 1, 13. UNCIO, Doc. 6, Vol. 6, p. 306.
[38] Kelsen, *op. cit.*, p. 126.

constitutional position in a confederation, there could be no dispute, in a more loosely interwoven international organisation, as to the position of member-States which are undoubtedly sovereign international persons. Thus Kelsen's criterion of determining sovereignty on the basis of express stipulation or otherwise is misleading, because it is the nature and character of a composite organisation which will determine what should or should not be stipulated in a constitution to produce the desired result. In a federation, for example, sovereignty is divided between the sovereign federal centre and the sovereign federating units, each being sovereign in its own defined sphere with no right of secession. This is the constitutional position irrespective of whether the residuary jurisdiction is located either in the centre or in the units. Thus when a federal constitution requires both the spheres to be clearly defined, it is of the essence that, if the federating units have to be given the right of secession, this must be expressly stated in the constitution. However, such an express stipulation which is necessary in a federation only, though not in an international organisation, would render the federating units fully capable of becoming sovereign. Apart from what actually happens in practice in the Soviet Union, it must be stated that in theory the federating units, if given the right to secede at will, should be regarded as fully sovereign because whatever the federal centre does, even in its own defind sphere, would be applicable to the federating units only so long as they consented to the same by not exercising their right of withdrawal. The only logical inference is that consent then becomes, in theory at least, the basis of the federal tie of the units. The latter, therefore, have the full potency to become sovereign to the same degree as any international person. Thus it is immaterial whether the constitution confers it, as in a federation it must, or the States have it inherent in their sovereignty, as must be the case in an international organisation, because so long as the right to secede is with them the units of a federation are as much sovereign at will as members of an international organisation.

Apart from this criticism of the statement made by the Soviet delegate, Kelsen has also pointed out that, in view of Articles 2 (6) and 39 of the Charter, withdrawal from the United Nations would be either meaningless or inconsistent with the provisions

of the Charter. This needs careful examination. To start with, Kelsen has criticised the Commentary of Committee 1/2 on the ground that it gave "any Member of the Organisation the right of withdrawing by a unilateral act" which, according to him, "is not quite consistent with the principles of the Charter."[39] It is argued that as the purpose of such withdrawal is to get rid of the obligations imposed upon the member by the Charter, the same cannot be served by withdrawal because of the existence of Article 2 (6), which places the non-members under the obligations established by the Charter just as members are. This criticism is only partly true because of the fact that the obligations imposed on non-members by Article 2 (6) of the Charter are not in every respect identical with the obligations imposed by the Charter on members. Article 2 (6) merely states that non-members of the United Nations are to act in accordance with the principles of the Charter "so far as may be necessary for the maintenance of international peace and security." As such, a withdrawing member would be in a position to shake off all those obligations of membership which do not come within the purview of Article 2 (6). Whatever may be the legal efficacy of this Article, since it attempts to bind sovereign States not signatories to the Charter, it would not be correct to suppose that the Article would completely nullify the effect of withdrawal and thus destroy the distinction between members and non-members of the United Nations. It is submitted that Article 2 (6) cannot have and was never intended to have this effect. What Article 2 (6) may ensure, if anything, is that the withdrawing member has to continue its co-operation with members in the maintenance of international peace and security.

Again, Kelsen has argued that if the Security Council considers withdrawal of a member to be a threat to peace it may "according to Article 39 recommend to the member to forbear from withdrawing, and, in case of non-compliance with this recommendation, take enforcement measures."[40] Thus the statement of the Commentary to the effect that "it is not the purpose of the Organisation to compel that member to continue its co-operation in the Organisation" is, according to Kelsen, "incompatible

[39] Kelsen, *op. cit.*, p. 124.
[40] Kelsen, *op. cit.*, pp. 124-5.

with the possibilities established by the wording of Article 39 of the Charter." The only flaw in this argument is that every withdrawal cannot constitute a threat to peace, and in normal times, when the international situation is not threatened, it would be quite out of place for the Security Council to contemplate enforcement action against a withdrawing State, which, by so doing, does not by any means violate the principles of the Charter—not even Article 2 (6)—as it may continue to have every intention of co-operating with the members of United Nations in the "maintenance of international peace and security." Thus withdrawal might necessitate enforcement action against a withdrawing member only if there was a clear threat to peace involved, in which event the withdrawing member is more likely to be prepared for war than not, and enforcement action would be necessitated irrespective of whether the State was a member of the United Nations or not, or whether it was withdrawing from the United Nations or not. In short, therefore, Article 2 (6) as well as Article 39 of the Charter do not bar the right of withdrawal from the United Nations. They may do so in exceptional circumstances, but we are legislating here for normal times, as exceptions there will be to any rule so long as human life remains as complicated as it is. Therefore, all things being equal, the right of withdrawal from the United Nations, not being barred by the Charter, must be said to exist. The Charter may be a higher law with all the sanctity that can be attached to its provisions, but on this particular issue only the highest law or the most sacred constitution of an international organisation would warrant action which does not conflict with its express provisions.

Revision by Mutual Consent

It is significant that revision of a treaty by consent of all parties concerned is a recognised method for which no stipulation is necessary. The parties which are signatories to the treaty being the framers of the instrument can certainly modify it at any time with the consent of all the signatories. However, once revision as a method is stipulated, it would bar the inherent right of unilateral withdrawal from an international organisation. This must be the interpretation when an implied alternative method like revision is inserted in a constituent instrument as an

express condition ruling out other alternatives. Thus the *argumentum a contrario* would certainly apply. For example, in the Washington Treaty of 1922 for the Limitation of Naval Armament [41] it was expressly stipulated in Article 21 that at the request of any signatory Power the contracting Powers would "meet in conference with a view to the reconsideration of the provisions of the treaty and its amendment by mutual agreement." Such a stipulation would rule out unilateral denunciation during the term of the treaty. Again, in the United Nations Charter, if revision by consent of all had been stipulated as the method for modifying the Charter, such a provision would have ruled out any inherent right to unilateral withdrawal.[42] It is noteworthy, therefore, that although revision by consent is always available in customary international law when not stipulated, its express stipulation in a treaty has the above-mentioned effect.

In addition to what has been stated above, there are also other reasons justifying withdrawal in accordance with the principles of general international law on the subject if certain events have occurred which would justify the same. Thus, for example, withdrawal may be sought on the plea of *clausula rebus sic stantibus* or the treaty may be terminated as a result of voidance or cancellation. These and similar considerations constitute a distinct subject of study and have therefore been examined separately.[43]

[41] Treaty Series No. 5 (1924) Cmd. 2036; A.J.I.L., 1922, Supplt., p. 55.
[42] But it is submitted that the same argument does not apply to revision by majority as provided by Article 109.
[43] See Chap. 8.

Chapter 7

NON-RATIFICATION OF CONSTITUTIONAL AMENDMENTS

When a constituent instrument makes no provision for its amendment, a non-ratifying member-State is entitled to withdraw in the sense that it can refuse to give its assent to the amended constitution, even if withdrawal had been specifically barred in the original treaty to which it was a signatory. This must be so because a sovereign member-State, having ratified a constituent instrument, is not bound by any amendments unless a process of amendment is specifically stipulated in that instrument, or its express consent has been given to the particular amendment. Again, even if the constituent instrument provides for expulsion, the organisation has no right to expel a non-ratifying State if the constituent instrument makes no provision for amendment, because in that event the only legal method available to enforce the amended constitution is to obtain the consent of all signatories.

However when the constituent instrument provides a machinery of amendment, it may also stipulate a procedure for dealing with a contingency created by the non-ratification of the amendment by a member-State or it may remain silent on that point. The position would be different in each case. Thus an express stipulation as to the position of a non-ratifying member would prevail over any implied right in customary international law. A clear example of an express stipulation is provided by Article 26 of the Covenant of the League and Article 94 (2) of the ICAO.

As the intention here is to study the position in the absence of an express provision, the situation will be considered where a process of amendment is specified in the constituent instrument but there is no provision relating to the position of a non-ratifying member. In that event, the problem must be analysed bearing in mind the following contingencies :

(a) withdrawal; and
(b) expulsion;
when they are
(i) expressly stipulated; or
(ii) absent in a constituent instrument.

Provision for Withdrawal expressly stipulated

Thus, for example, if the procedure for withdrawal is prescribed in a constituent instrument, the non-ratifying member must avail itself of that procedure in order to withdraw from an organisation which has changed against its wishes. This is the position when the instrument provides a machinery for amendment but makes no provision for the non-ratifying member. It would not be possible to compel the dissenting member-State to respect the amending mechanism to which it had consented, since it could always make use of the withdrawal clause. The normal withdrawal clause of a constituent instrument does not require a withdrawing member to give reasons, legal or otherwise, to justify its withdrawal. As explained earlier,[1] the normal conditions of withdrawal are a notice and/or an initial prohibitory period after which withdrawal on any ground is permissible. Thus, even when the constituent instrument does provide for a mechanism of amendment but simultaneously has a normal withdrawal clause also, the non-ratifying member-State, even though bound by the amending machinery, can legally withdraw from the organisation when it wants to do so without assigning reasons, in the absence of any provisions to the contrary.

Provision for Expulsion expressly stipulated

Again, when a constituent instrument has a general expulsion clause, but does not make any provision for the non-ratifying member, although containing machinery for amendment, the organisation is entitled to make use of the expulsion clause and terminate the membership of a non-ratifying member-State, which, though bound by the amending machinery, insists on its membership on the unamended basis. In a normal expulsion clause, the organisation enjoys the right to expel in the event of a violation of the principles of the organisation, and it is submitted that disregarding an amendment which has come into force in

[1] See Chap. 2 dealing with the conditions of withdrawal.

accordance with the agreed amending machinery would amount to a violation of the principles of the organisation. Thus, in the absence of an express stipulation relating to the position of a non-ratifying member, the organisation would be empowered to make full use of the general expulsion clause contained in the constituent instrument.

No expressed provision for Withdrawal

However, if there is no withdrawal clause in the constituent instrument, and no stipulation made relating to the position of the non-ratifying member, withdrawal on the ground of non-ratification is controversial. This is the position in the United Nations. There is no withdrawal clause in the United Nations Charter, and although there is a machinery of amendment stipulated in Articles 108 and 109, there is no provision relating to the non-ratifying State ceasing to be a member merely on the ground of its non-ratification, as was provided by Article 26 of the Covenant of the League. The correct legal approach in such a case would be based on the application of organisational and constitutional principles as against those general rules of law which would be applicable to the normal treaty. Kelsen is, therefore, right when he points out that all signatories to the United Nations Charter have accepted the mechanism of amendment stipulated in Articles 108 and 109, and cannot, after their express consent to it, argue that they have a right to withdraw on the plea that a particular amendment, to which they could not agree and did not consent, *ipso facto* gave them the right to withdraw from the Organisation.[2] It is, of course, not necessary for every international organisation to provide for an amending machinery. However, if it does provide for such a machinery and the sovereign member-States, by ratifying the treaty, accept the machinery, they must certainly be held to be bound by it. This would be so both on the constitutional principle and in accordance with customary international law, which expects States to respect obligations to which they have expressly consented.

The plea *pacta tertiis nec nocent nec prosunt* is not available to permit the non-ratifying member-State to withdraw because the latter, having consented to the constituent instrument with its

[2] Kelsen, *op. cit.*, pp. 123–124.

amending machinery, cannot now plead that it is a "third party" to an amendment which has been adopted in accordance with the prescribed procedure. There can be no question of a member of an international organisation becoming a "third party" after it has expressly consented to its Charter. The only argument that can be put forward in favour of the right of the non-ratifying sovereign member-State to withdraw from the organisation is that, in accordance with international practice, it is not bound by any convention unless it has ratified it. Although a fully accredited representative of a sovereign State may have participated in the formulation of a convention, that State is not bound unless it has ratified it in accordance with its internal constitutional process. On that analogy, it could be argued that a member-State dissenting from an amendment of an organisation which has been passed by the stipulated majority could not be bound by the amendment until it has ratified it. Some of the constituent instruments do provide for the right of ratification of member-States, but they also provide that if a certain specified majority of members has ratified it the amendment shall come into force in respect of all members.[3] A member-State having agreed to that formula must be said to be governed by the constitutional principle and not by any other residuary jurisdiction or the plea *pacta tertiis nec nocent nec prosunt*. To admit the right of the non-ratifying member-State, by virtue of its residuary jurisdiction, to refuse to be bound by an amendment to the constitution when it had been moved in accordance with an agreed procedure, would be to create a position incompatible with any idea of international law binding upon the State.

Thus up to this point there is every reason to agree with the views of Kelsen because, by a clear provision which has been

[3] For example, see (i) International Monetary Fund—Article XVII—(a) " . . . When three-fifths of the members, having four-fifths of the total voting power, have accepted the proposed amendment, the Fund shall certify the fact by a formal communication addressed to all members." (c) " Amendments shall enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram." (ii) A similar provision exists in Article VIII of the International Bank. (iii) Article 73 of WHO, reads as follows:— ". . . Amendments shall come into force for all Members when adopted by a two-thirds vote of the Health Assembly and accepted by two-thirds of the Members in accordance with *their respective constitutional processes.*"

consented to by all the members of the United Nations, the amendment becomes binding, not only upon the members which have voted for it or recommended it and ratified it, but also upon all the other members, including those who may have dissented from it. However, having agreed up to this point, it is not possible to concur in the conclusion reached by Kelsen in the case of the United Nations because the door to withdrawal is left completely open.

It has been argued by some that withdrawal on the ground of non-ratification of an amendment moved in accordance with Articles 108 and 109 of the Charter would be illegal and unjustified. It must, nevertheless, be admitted that the withdrawing State is not required to give any reasons for its withdrawal. When a withdrawal clause is absent in a constituent instrument and there is no provision to modify or restrict it by compelling the withdrawing State to submit reasons for withdrawal, it seems right to suppose that the withdrawing State would be entitled to terminate its membership of the organisation for any reason whatsoever, since one starts from the basic rule that withdrawal is not illegal and requires no justification. Thus, there is nothing to prevent a non-ratifying member-State from withdrawing from the United Nations even on the ground of non-ratification. However, one must accept that the non-ratifying State, which does not withdraw, in disregarding an amendment which has come into force and thus altered the constitution by an agreed mechanism of amendment, commits a violation of one of the principles of the Organisation, and is thus subject to such action being taken against it as is stipulated in the constituent instrument and is permissible in customary international law. For example, the Organisation could expel that member-State for violating the principles of the Organisation if an expulsion clause was provided in the constituent instrument. Even enforcement action could be taken against it in appropriate circumstances. This would result from disregard of the amendment, not from the withdrawal. The essence of the matter is that refusal to ratify and thus disregard a valid amendment would amount to violation of the Charter of the Organisation but not the act of withdrawal as such, which, if not barred or modified, would be permissible under any

conditions. Thus it would not be possible to hold the withdrawing State guilty of any illegality merely by its act of withdrawal, nor could its guilt be thereby increased. This would appear to be the interpretation when the door to withdrawal is left completely open.

Thus the Commentary of Committee 1/2 of the San Francisco Conference is right when it states "Nor would a member be bound to remain in the Organisation if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept." This represents the correct position in accordance with customary international law. Again, one can only generally agree with Kelsen, but not with reference to the United Nations, when he criticises that portion of the Commentary which states that "if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect," the aggrieved member-State would have a right to withdraw from the Organisation. Kelsen [4] has pertinently observed that if the amendment does not come into effect "the legal situation is unchanged" and as such it cannot be regarded as a grievance or a condition legitimately conferring any right on the State concerned to walk out of the Organisation.[5] However, it is again submitted that as the door to withdrawal is left open in the United Nations a State is not prevented from leaving the Organisation on this or any other excuse. Though the Commentary mentions "Exceptional Circumstances" for withdrawal, it has already been pointed out that it has no legal value or binding force. It is, however, significant that the Commentary should have found reason to mention this very lame excuse as a legitimate one warranting withdrawal. It is submitted that in this context the question of legality or justifiability of the reason for withdrawal need not even be considered.

[4] *Loc. cit.*, p. 124.

[5] But long-delayed ratification may create grave problems. See C. D'Olivier Farran: "The question of a time limit for the ratification of the amendments to the Charter of the United Nations," *International and Comparative Law Quarterly*, Vol. 4, 1955, p. 475.

No expressed provision for expulsion

The position relating to the non-ratifying State when the constituent instrument neither provides for an expulsion clause nor for measures in respect of the non-ratifying member has already been discussed at the beginning of Chapter 6.

Military Pacts and Other Treaties

Again, in treaties like the Bogotá Charter or the Inter-American Treaty of Reciprocal Assistance,[7] though the constituent instrument expressly recites that the Treaty "shall remain in force indefinitely," provision is made for unilateral withdrawal after a two-years' notice. A similar provision is found in the ANZUS Pact[8] which, according to Article 10, keeps the Treaty "in force indefinitely" but permits unilateral withdrawal after one year's notice. It is, therefore, significant that in the above-mentioned treaties, which are intended to be of indefinite duration, a withdrawal clause should have been included, because without that provision withdrawal would have been prevented on account of the clause making the treaty a perpetual one. It is, again, noteworthy that in all cases a withdrawal clause has been introduced to regulate the procedure of withdrawal, *e.g.*, by introducing the condition of giving a notice of one or two years before withdrawal becomes effective. Thus the withdrawal clause is not stipulated with the intention of recognising the right of the member-State to withdraw, but is introduced to modify or regulate the inherent or residuary right of withdrawal by subjecting it to a notice period.

In other treaties which stipulate a fixed period of duration, withdrawal must be deemed to be barred during that period even though no provision may exist on that point. This is true irrespective of whether the treaty establishes an organisation or contemplates an alliance or a pact. The clear intention of the parties when they stipulate a period is that they do not wish any modification of the treaty during that period. Thus in the case of the Brussels Treaty Organisation,[9] Article 12[10] stipulates clearly that the treaty shall remain in force for fifty years and

[7] See also Chap. 2.
[8] See also Chap. 2.
[9] See also Chap. 2.
[10] Formerly Article 10. See Appendix.

" after the expiry of that period each of the high contracting parties shall have the right to cease to be a party thereto provided that he shall have previously given one year's notice of denunciation to the Belgian Government." As unilateral withdrawal has been permitted after fifty years, on one year's notice, the inference is that unilateral denunciation within the period of the first fifty years is denied. The same is the case in the North Atlantic Treaty, where Article 13 stipulates that after a period of twenty years " any party may cease to be a party one year after its notice of denunciation has been given to the Government of the United States." Though Article 12 provides for revision by mutual consent after the treaty has been in force for ten years, it is clear by the application of *argumentum a contrario* that no withdrawal is permissible for twenty years. In the abortive Treaty for a European Defence Community a life of fifty years was stipulated and the constituent instrument had no withdrawal clause. This also would have prevented unilateral withdrawal for the first years of the treaty. However, Article 128 of the European Defence Community permitted revision of the Treaty with the consent of the High Contracting Parties if NATO ceased to be in force before a European Federation was accomplished.[11] Thus an express stipulation of a period whether indicating the life of the Treaty, as in the European Coal and Steel Community,[12] or indicating an initial prohibitory period after which unilateral withdrawal with notice is permitted, as in the Brussels Treaty or NATO,[13] has the legal effect of barring withdrawal during that period unless the constituent instrument expressly provides to the contrary.

Political Treaties

Political treaties have the same binding force as any other treaty. If they are bipartite or multipartite, they are usually " law-making in nature," in respect of which unilateral denunciation would be completely barred. If a change were necessary, it would have to be brought about by a revision of the mutual obligations with the consent of the parties unless there had been a vital

[11] See Chap. 1 and Appendix.
[12] Article 97 of the Treaty. See Chap. 1 and Appendix.
[13] See Chap. 1 and Appendix.

change in the circumstances.[14] When a political treaty establishes an international organisation, withdrawal is certainly governed by the constitutional principle already enunciated. This would hold good even if the constituent instrument were to make special provision in respect of the sanctity of treaty obligations as is found in the Covenant of the League and the United Nations Charter. The Preamble to the Covenant sets out as one of the objectives of the Organisation " the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised people with one another." Similarly, the United Nations Charter in the Preamble mentions as an objective the establishment of " conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." It will be appreciated that in spite of the recital of these objectives, withdrawal would be governed either by the express stipulation, if any, or in accordance with the appropriate constitutional norm which alone could determine whether the sanctity of a treaty had been violated or not. In regard to an implied power of denunciation in political treaties, Oppenheim-Lauterpacht maintains that " alliances not concluded for a fixed period only, can always be dissolved after notice, although such notice be not expressly provided for." [15] This cannot be true of every alliance, but would certainly hold good in all cases where the parties did not intend to set up an " everlasting condition of things." Thus in regard to any implied power of denunciation, political treaties may be classified into two categories :

(i) The first category may be said to comprise political treaties intended by the parties to be of a permanent nature, as gathered from the object of the treaty, which may be to set up a permanent régime or status, such as the internationalised administration of straits and canals or the neutralisation of a State. These cannot be denounced on the ground of any implied right. Again, though neutralisation cannot be regarded as organisational in pattern, the internationalised administration of straits does establish some sort of an institution. For example, the Danube Convention sets up an administrative organisation, and it is, therefore, significant that Article 46 of the 1948 Convention should expressly stipulate

[14] See Chap. 8 for a detailed examination of the application of *rebus sic stantibus* to international organisations.
[15] Oppenheim, *op. cit.*, p. 938.

revision with the consent of the majority of signatories as the only method of modification or termination of that treaty. In the absence of such a stipulation withdrawal as an inherent or residuary right would certainly have been possible.

(ii) In the second category of political treaties, the intention of the parties to create perpetual obligations is not always clear. This would include alliances or pacts of guarantee or non-aggression where the problem must be determined as a question of interpretation, after a careful examination, rather than under any rule of law of uniform or universal applicability. It could, however, be certainly stated that where the intention of the parties is not to create obligations of perpetual duration, the treaty may be said to contain a modified power to denounce on reasonable notice. However, much would depend upon the individual instrument under consideration, and a treaty of alliance not concluded for a fixed period only could also be intended to be perpetual, in which event there could be no implied right to denounce. However, one could probably generalise so far as to say that a commercial treaty or a treaty of political alliance in which the period of duration is not expressed could be terminated after notice, even though such notice be not expressly stated in the instrument. This view is supported by Oppenheim-Lauterpacht.[16]

Conclusion

Thus when an international organisation, whether global or regional, permanent or temporary, intends to bar withdrawal, it can achieve that result by express terms to that effect rather than by silence. If the intention is to ban withdrawal for a certain initial period, this should be expressly stated. Again, if a two-year notice period has to be prescribed, that also should be expressed in the constituent instrument. Thus the absence of a withdrawal clause would keep the door open to any member-State to withdraw at any time for any reason and under any circumstances. This cannot, however, be said of all other kinds of treaties in which, if there is no withdrawal clause and the intention of the parties on the face of the instrument is to enter into a commitment of a permanent nature, the presumption would be against unilateral denunciation. All law-making treaties and multilateral

[16] Oppenheim, *op. cit.*, p. 988.

conventions such as the Slavery Convention, 1926,[17] the Labour Conventions [18] or the Hague Conventions, come in this category. However, in addition to this class, there are other treaties attempting to establish a permanent régime, such as the administration of canals, neutralisation of a State, etc. In such types of treaty, even though there is no provision for denunciation, there can be no question of a right reserved to the signatory States (on the ground of sovereignty or residuary jurisdiction) to resort to unilateral denunciation, because those treaties do not create an international organisation in respect of which alone such a presumption can be made. In the circumstances, a straightforward commitment of a sovereign State entered into by virtue of a treaty which is other than organisational in pattern should be regarded as perpetual unless the contrary intention appears. The factors governing termination are, therefore, essentially dependent on the nature of the treaty. It is an implied condition of every treaty that it shall be observed by the contracting parties. However, if one party refuses to fulfil its obligations, such a refusal confers on the other parties either a right to resort to measures of redress which attend the commission of an international wrong or a right to annul the treaty and thus put an end to all obligations connected therewith. This latter right of abrogation is not available to a signatory of a constituent instrument, because if one member withdraws from an organisation in contravention of the constituent instrument, the other signatories do not get any right to liquidate the entire organisation. In short, therefore, the essence of the matter is the paramount importance of the nature of the treaty, which must always be examined before any legal inference can be drawn as to its termination, particularly when the instrument is silent on this vital point. Again, the correct legal approach in such circumstances is one which is based on the constitutional and organisational principle.

[17] L.N.T.S. 60, p. 253, Hudson, *International Legislation*, III, p. 2010.
[18] See, *e.g.*, the Conventions in *ibid.*, Vol. 5, pp. 609 *et seq.*

Part Four

THE APPLICATION OF THE PRINCIPLES OF INTERNATIONAL LAW

In combination with the matters discussed above, it is also essential to consider the operation of the general principles of international law on constituent instruments, in so far as they bring about a revision or termination of the constituent instrument itself and thereby affect membership of individual States. This is examined at length in Chapter 8.

Attenion will be concentrated on the application of the principles of international law to the particular problem created by the prolonged refusal of the United Nations to take a firm decision on the question of China's representation. China, as such, is a signatory of the United Nations Charter and a permanent member of the Security Council, but she, in so far as she is represented by the Communist Government on the mainland, has been denied the right to send her representatives to the United Nations and its Specialised Agencies, which amounts to denying the very essence of membership. As a result, this novel method of termination of membership has come to the forefront, and its legality requires a careful investigation in the light of accepted principles of international law. This task is undertaken in Chapter 9 of this Part.

CHAPTER 8

TERMINATION OF CONSTITUENT INSTRUMENT BY MUTUAL CONSENT

INTERNATIONAL practice on the termination of treaties, unilaterally or otherwise, has nowhere been formulated by States into an agreed principle of law except in the Protocol appended to the Treaty of London in 1871.[1] "This essential principle of the Law of Nations," as accepted and signed by the plenipotentiaries of Germany, Austria, Great Britain, Italy, Russia, Turkey and subsequently adopted by France, was that "no power can liberate itself from the engagements of a treaty or modify the stipulations thereof unless with the assent of the contracting Powers, by means of an amicable settlement." The essence of this principle appears to be enshrined in some of the subsequent treaties. Article 21 of the Washington Treaty for Limitation of Naval Armament, 1922,[2] provides for "amendment by mutual agreement." Again in Article 36 of the General Act of Berlin, 1885, which was said to provide the Congo Basin with a "régime, a Statute and a Constitution," the same principle was reiterated in the following words[3]:

> "The signatory Powers of the present General Act reserve to themselves to introduce into it subsequently, and *by common accord*, such modifications and improvements as experience may show to be expedient."

As the framers of the treaty are its masters, suspension, termination or modification of the treaty by mutual agreement between the parties is indisputably legal. This is indeed a primary rule and may be regarded as the very starting point of the law of nations.[4] The Protocol Principle of 1871, has, therefore, been

[1] Martens, N. R. G., 18, p. 278.
[2] See *supra*, Chap. 7.
[3] See *Oscar Chinn* case, P.C.I.J. 1934 A/B p. 312.
[4] The negotiations leading to the Pact of Rome of July 15, 1933 are instructive. Final draft is tacitly based upon the principle of no revision without consent. See *Documents on International Affairs 1933*, Royal Institute of International Affairs, pp. 236–277, for negotiations and earlier draft. Text of Treaty, Martens N. R. G., Vol. 28, 1934, p. 4.

criticised as being too elementary to need a formal declaration. Another criticism is that although it is well meaning, it is still impracticable. There are also exceptions to this rule, because a party in certain circumstances, such as violation of the treaty by another party, gets the right to abrogate it without the consent of other signatories. However, this exception would not exist in the case of constituent instruments. Again, the effect of war may be to dissolve a treaty otherwise than by the mutual consent of all parties. The bearing of the 1871 principle on the doctrine of *rebus sic stantibus* is discussed later. However, there can be no dispute that mutual consent is one of the recognised and well-established grounds for dissolution of treaties. Thus the constituent instrument of an international organisation can be partly modified by the withdrawal of a signatory member-State, or it can be totally terminated by dissolution of the organisation by resorting to this primary method of mutual consent of the high contracting parties.

(1) Recession

Again, mutual consent can be witnessed in three different ways—Recession, Substitution and Renunciation.

First, Recession, which contemplates an express declaration of the parties dissolving the treaty, applies alike to ordinary treaties as well as to those which give birth to international organisations. In actual practice, international organisations are wound up by a resolution liquidating the organisation. This in fact is the normal method of termination as will become clear from a study of Substitution.

(2) Substitution

Secondly, there can be Substitution of one treaty by another treaty on the basis of mutual consent. This could also apply to treaties creating international organisations if, as a result of the consent of the parties, a new organisation is brought into being with the clear intention to discontinue the previous one. However, in actual practice, this method of dissolution is not resorted to by member-nations of international organisations. Thus, for example, the United Nations Charter could possibly have terminated the Covenant of the League on the basis of Substitution,

but in practice it was found necessary to dissolve the League by an express resolution of 1946 which was adopted by the General Assembly and led to the appointment of a Board of Liquidation and the consequent disappearance of the League system.[5] Similarly, the IRO was liquidated by a resolution.[6] Another interesting example is that of the Permanent Court of International Justice, which ceased to exist in April 1946[7] and which was replaced by the International Court of Justice. The method of Substitution was again not adopted and in practice it was found necessary for all the judges to tender their resignations for the Permanent Court to be brought to an end and for a new Court to be independently constituted.[8] Thus the clear interpretation is that the new Court is not the successor of the old in the sense of having been *ipso facto* substituted in place of the former judicial organisation. However, the new Court may be said to be a continuation of the old one because, in Article 92 of the Charter, it is laid down that it shall function in accordance with the Statute " which is based upon the Statute of the Permanent Court of International Justice." This Article may lead to the inference that there is some sort of continuity between the two institutions but legally this is certainly not a case of Substitution although declarations made under the Statute of the old Court continue in force for the new one.

It is true, however, that some constituent instruments contemplate supersession or absorption of other similar international organisations. Thus the UNESCO constitution provides in Article IX that:

> " whenever the General Conference of this Organisation and the competent authorities of any other specialised intergovernmental organisation or agencies whose purposes and functions lie within the competence of this organisation

[5] *League of Nations Official Journal*, special Suppl., No. 194 (1946), pp. 139–140, and Annex 27, p. 281.

[6] I.R.O. Document G.C. 268: I.R.O. Document G.C. S.R. 101 (Summary Record of 101st Meeting of General Council) p. 11.

[7] *League of Nations Official Journal, loc. cit.*, Annex 27, p. 278.

[8] *Ibid.* There was no provision for amendment in the Statute and thus the consent of all parties would have been required in order to amend. The same is theoretically true of dissolution, but at any rate the creation of the new Court was not similarly dependent on the consent of all parties to the old Statute. See Manley O. Hudson, " 24th Year of the World Court," A.J.I.L., Vol. 40 (1946), p. 1.

deem it desirable to effect a transfer of their resources and activities to this Organisation, the Director-General, subject to the approval of the Conference, may enter into mutually acceptable arrangements for this purpose."

However, it would appear necessary to liquidate by its own machinery the body to be superseded or absorbed. Irrespective of whether a constituent instrument provides a machinery or keeps silent on that point, the correct procedure would be to act through the machinery of the old body rather than to resort to appropriate action by the new body or even allow by presumption the substitution of one organisation by another.

(3) Renunciation

Again, Renunciation, which is also a method of termination by mutual consent, is not applicable to treaties constituting international organisations because, by its very nature, it is restricted to bipartite arrangements only. The rule is that if obligations are imposed on one contracting party, the other party can renounce its rights and thus terminate the treaty. Renunciation is truly consensual, because even the renunciation of rights must be accepted by the party which is subjected to the obligation of performance. Renunciation would, therefore, more properly apply to bipartite than to multipartite treaties. As treaties which establish international organisations are always multipartite and do not confer "obligations" on one set of members as against "rights" on another set, renunciation would have no place in this category of treaties.

Apart from mutual consent, there are other methods and conditions known to customary international law according to which the binding force of treaties in general can be terminated. It will also be necessary to examine the applicability of these factors to the special category of treaties which create international organisations. These various methods and conditions are set out below.

Other Methods of Termination

According to Oppenheim, there are four distinct ways by which the binding force of a treaty may be terminated.[9] They are :

[9] Oppenheim, *op. cit.*, p. 936.

(1) Expiration of a treaty as a result of—
  (i) expiration of the period for which concluded;
  (ii) expiration through resolutive condition.
(2) Dissolution by—
  (i) mutual consent; or
  (ii) withdrawal by notice; or
  (iii) as a result of a vital change of circumstances (*clausula rebus sic stantibus*).
(3) Voidance as a result of—
  (i) extinction of one of the contracting parties;
  (ii) impossibility of execution;
  (iii) realisation of the purpose of the treaty;
  (iv) extinction of the object of the treaty.
(4) Cancellation on the ground of—
  (i) inconsistency with subsequent international law;
  (ii) abrogation;
  (iii) change of status of one of the contracting parties;
  (iv) war.

In addition to the above, we may also mention:

(5) Desuetude.

It is indeed significant that most of the conditions leading to Voidance or Cancellation of a treaty come in the broad category of "vital change of circumstances" and raise the plea of "*rebus sic stantibus*." However, it is best to classify these methods on the basis of the effect they produce of the treaty such as Voidance or Cancellation or Expiration rather than on the broad principle of nature of causation like "vital change of circumstances." These methods may now be examined in detail with special reference to their application to those treaties which establish international organisations.

(1) *Expiration*

Expiration of a treaty as a result of the expiration of the period for which it was specifically concluded is indeed elementary. It applies alike to all treaties. Thus NATO would expire after twenty years and the European Coal and Steel Community after fifty years[10] and the Anglo-Soviet Alliance[11] after twenty

[10] See *supra*, p. 29.
[11] See Chap. 2.

years from the date these treaties respectively came into force. In short, therefore, this method of termination through expiration of time governs constituent instruments as much as any other treaty.

However, the same cannot be said of expiration as a result of the occurrence of a certain fact which was stipulated in the treaty as a condition leading to termination. It is submitted that this method could only apply appropriately to the ordinary types of treaty or to those constituent instruments which would give birth to temporary international organisations. However, even the latter category would be governed more by expiration of their *raison d'être* than on the happening of a condition previously stipulated in the constituent instrument. Thus the International Refugee Organisation was set up for the purposes of "repatriation; identification, registration and classification; care and assistance; legal and political protection; transport; and resettlement and re-establishment of refugees and displaced persons in countries able and willing to receive them." When its *raison d'être* was over and the purpose for which it was created was completely fulfilled, the Organisation was liquidated. There was no condition stipulated for its dissolution, although it was contemplated as a temporary organisation with a specified task to perform. In the circumstances, one can visualise the completion of the performance of the task as terminating a temporary international organisation but even this requires an express resolution liquidating the organisation. Thus expiration of an organisation through a resolutive condition is difficult to contemplate.

(2) *Dissolution*

Dissolution can be on three grounds, namely, (i) mutual consent; (ii) withdrawal by notice; and (iii) on the plea of *rebus sic stantibus*.

(i) Mutual consent

Dissolution by mutual consent has already been examined at length as the first or primary method of termination of international organisations. Although difficult to achieve in actual practice, it is the most satisfactory and legally unchallenged device that could be resorted to by member-States of world organisations.

(ii) Withdrawal by notice

Dissolution can also be brought about as a result of withdrawal by notice. On this particular subject the position has been explained in the earlier chapters, both when such a clause is contained in a constituent instrument and also when the instrument is silent on the point.[12]

(iii) Rebus sic stantibus

Lastly, dissolution has also been claimed by States on the ground of a vital change in circumstances which would release a party from the obligations of a treaty. Though the doctrine has nowhere been defined—neither by international tribunals nor by any treaty—it can best be summarised by quoting the statement which Zouche [13] attributes to the advisers of Queen Elizabeth, which, as translated by Brierly, reads as follows: "Every convention, although sworn, must be understood to hold only while things remain in the same state; that a man is more strongly bound to his country than to a private promise; and that princes are not bound by their contract when the contract results in public injury."

Although there is no definition of this doctrine on which general agreement between writers has so far been reached, it can be stated that the few States which have invoked it have agreed that it is based upon (i) a fundamental condition; and (ii) some sort of a basic intention of the parties at the time of the conclusion of the treaty. Though there is mostly agreement regarding the intention, the same cannot be said of the condition as there is a clear difference of opinion on the nature and intensity of the change which would justify a party's release from its international obligations.[14] For example, Oppenheim regards unforeseen change of circumstances to be of such a nature as to "imperil the

[12] See Parts 2 and 3.

[13] Zouche—*Jus et Judicium Feciali*, II. iv. 25. Text and Translation by Brierly in *Classics of International Law*.

[14] For a somewhat different view of the basis of *clausula rebus sic stantibus*, see Dissenting Opinions of Judge Alvarez in "Competence of Assembly regarding Admission to the United Nations" (1950) Advisory Opinion, *I.C.J. Reports* 1950, pp. 4 and 17, and in "Anglo-Iranian Oil Case judgment 1952," *I.C.J. Reports* 1952, pp. 93 and 126. See also the Dissenting Opinion of Judge Winiarski in "Interpretations of Peace Treaties" (1st Phase) 1950, Advisory Opinion, *I.C.J. Reports* 1950, pp. 65 and 94, criticised by Cheng in *General Principles of Law*, 1953, at pp. 113 and 118.

existence or vital development of one of the parties."[15] This is in conformity with the Elizabethan conception of the clause, but in actual practice States have invoked the doctrine for varying reasons including questions relating to debts where nothing is imperilled except a certain sum of money.[16]

Without entering into the details of the doctrine, or examining its controversial aspects, it is necessary here to study mainly its applicability to international organisations. There is no doubt that the doctrine has been recognised in one form or another—(a) by States which have considered themselves to be no longer bound by certain administrative institutions which, as a result of a vital change of circumstances, have lost their *raison d'être;* and (b) by constituent instruments of certain international organisations which have the maintenance of peace and security as their objective and incorporate a machinery for revision of the *status quo* by mutual consent. So when it is sought to bring about international change by peaceful means, a stipulation is often made that this shall be brought about by consent and agreement and without the use of force.

Again, commercial treaties quite often make an express provision for their termination on the ground of change in circumstances. Thus Article 32 (3) of the Treaty of Commerce of May 1, 1934, between Germany and Yugoslavia[17] provided that if the prevailing economic conditions, which were the basis of the treaty, altered to the detriment of one party, it could give three months' notice of termination instead of the normal two years' notice. Another example is furnished by the most-favoured-nation treaty between the United States and France of May 6, 1936,[18] wherein Article 12 (4 and 5) stipulates that if the application of the provisions of the treaty became dangerous to the vital interests of one of the contracting parties, it shall get the right to denounce it forthwith. There are several such clear examples of the doctrine to be found in commercial treaties. As we are concerned here with treaties giving birth to international organisations only, we

[15] Oppenheim, *op. cit.*, p. 940.
[16] See judgment of P.C.I.J. of July 12, 1929, in the case of *Serbian and Brazilian loans in France*, Series A, Nos. 20-21, pp. 39 and 120: the doctrine was not relied on in terms but in the form of *force majeure*.
[17] *Reichsgesetzblatt*, Part II of May 19, 1934.
[18] *Journal Officiel de la République Française*, May 13, 1936.

must concentrate on the application of the doctrine to that particular class. However, as administrative institutions are somewhat akin to international organisations, they are discussed below and provisions in typical constituent instruments examined later.

(a) *Rebus sic stantibus and administrative institutions*

The application of the doctrine to administrative institutions is governed by somewhat different considerations from those which generally apply to international organisations. Thus, for example, at the Conference which preceded the Treaty of Lausanne of 1923 Turkey contended that the capitulation system must be said to be abolished on the basis of the doctrine of *rebus sic stantibus*.[19] Similarly, in the case of the Advisory Opinion of the Permanent Court on the *French Nationality Decrees in Tunis and Morocco*, France contended that the treaties concluded between Great Britain and Morocco " in perpetuity " had elapsed by virtue of the principle known as *clausula rebus sic stantibus*, because the establishment of a legal and judicial régime in conformity with French legislation had created a new situation which deprived the capitulatory régime of its *raison d'être*.[20] Again, China invoked the same principle for a similar purpose.[21] Another example in relation to administrative institutions is furnished by the Turkish note of April 10, 1936, which sought the revision of Article 8 of the Straits Convention on the basis of a change in circumstances, though it did not expressly mention the doctrine.[22] The Russian withdrawal from the stipulations of the Treaty of Paris of 1856 in respect of the neutralisation of the Black Sea is also relevant in this connection.[23] But the administrative institutions in respect of which this doctrine has been invoked cannot be regarded as typical international organisations, because the

[19] See Woolsey, " The Unilateral Termination of Treaties," A.J.I.L., Vol. 20, 1926, pp. 346–353.

[20] See Advisory Opinion of the Permanent Court of International Justice in Nationality Decrees in Tunis and Morocco, 1923, Series B, No. 4, p. 29.

[21] (i) See Treaty between Governments of Britain and China of December 20, 1928, when provisions of previous treaties limiting right of China to settle her national customs tariff were abrogated. (Treaty Series, No. 10 (1929) Cmd. 3319.)
(ii) See also Treaty of 1943 between Great Britain and China for the relinquishment of extraterritorial rights in China. (Treaty Series, No. 2, (1943) Cmd. 6456.)

[22] *Official Journal*, 1936, p. 504.

[23] See Oppenheim, *op. cit.*, Vol. 1, p. 943. Russia later signed the Protocol to the Treaty of London, *ibid.* See the opening of this chapter.

former have a limited purpose, are essentially executory in character, and are more administrative than organisational by nature. It would be difficult to visualise, for example, how far a State could, in the circumstances mentioned above, invoke this doctrine to dissolve an international organisation of the type of the United Nations or any one of its Specialised Agencies. Moreover, this doctrine was invoked in the above-mentioned cases because the administrative agreement had neither a provision for withdrawal, nor for amendment, nor for revision by any stipulated method. It, therefore, left the aggrieved party no remedy except to resort to the doctrine of change of circumstances. However, in international organisations which are permanent, and global or universal in character, there is a machinery of amendment and more often than not withdrawal is not barred. Again, some of them even prescribed a procedure for bringing about international change or modification of the instrument by peaceful means so that a member-State burdened with obligations that have become inequitable could withdraw.

(b) *The doctrine as stipulated in constituent instruments*

Thus, for example, in the Covenant of the League, Article 19 expressly empowered the Assembly to advise reconsideration of treaties " which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world." Though this Article did not set up a machinery of revision or amendment and was not confined in its operation to international organisations *simpliciter*, it is of interest as a declaration of a principle.[24] Though Articles 14 and 39 of the United Nations Charter do not precisely reiterate this doctrine, they do make provision for bringing about international change by peaceful means.[25] However, from the viewpoint of termination

[24] See Article 19 of the Treaty of Versailles, 1919.

[25] Article 14 of United Nations Charter reads as follows:—" Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations." Article 39 of United Nations Charter reads as follows:— " The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security."

of an international organisation or withdrawal, these provisions could not normally be invoked, because an organisation or its membership as such could hardly threaten the existence of the State or the maintenance of peace and security.

In addition to these general revisionary stipulations, constituent instruments also provide amending machinery which may not particularly help withdrawal but would certainly assist the aggrieved member-State to seek, with the co-operation of other members, modification of its obligations resulting from changed circumstances. In earlier chapters, the amending machinery in relation to termination has been discussed, and it suffices to say here that not only global or universal organisations like the League of Nations (Article 26) and United Nations (Articles 108 and 109), but Specialised Agencies such as ILO (Article 36), FAO (Article XIX), International Monetary Fund (Article XVII), International Bank (Article VIII), ICAO (Article 94), UNESCO (Article XIII), as well as even temporary organisations like UNRRA (Article VIII), have an amending machinery.

Thus, where a clear provision is made enshrining the principle of *rebus sic stantibus* in some form or the other, the only legal method for terminating or altering the provisions of a constituent instrument would be to invoke the express provision. As already pointed out, the universal practice now adopted in such cases is to bring about a change by mutual consent and agreement. This was the principle enunciated in 1871, when Russia declared that she was no longer bound by the Treaty of Paris in regard to its provisions relating to the Black Sea. The necessity of the doctrine of *rebus sic stantibus* was then admitted by a Protocol which, however, simultaneously stipulated that unilateral denunciation could not be permitted. In this respect the argument given by Lord Phillimore [26] may also be cited where he has insisted that the clause *rebus sic stantibus* ought not to give a State the right to declare itself free from the obligations of a treaty on the mere occurrence of the vital change of circumstances. The most that the doctrine can do is to entitle the State concerned to claim a revision of the treaty. In the circumstances the first legal step which a State could take would be to approach other signatories with the request that it may be permitted to abrogate the treaty.

[26] *Three Centuries of Treaties of Peace* (1919), pp. 134–135.

It is only on the refusal of the other parties to release the aggrieved State that the doctrine of self-help could be permitted. This, too, it is argued, should be made subject to a reference to the International Court, which alone would be the proper juridical method of settling the problem arising out of a vital change in circumstances.

Again, if no such stipulation or machinery for revision be made in the constituent instrument, the doctrine of *rebus sic stantibus* could not be invoked if

(a) withdrawal be permissible; or

(b) a satisfactory machinery of amendment be provided.

The essence of the matter is that if, as a result of a vital change, a State has to be released from the burden of its obligations on grounds of equity and the maintenance of peace and it is possible for that State to achieve the same by using the available methods, the doctrine of *rebus sic stantibus*, which is based on an implied condition, cannot be invoked. Thus, if a satisfactory machinery of amendment to the constituent instrument is stipulated, it is essential that it should be resorted to before any right of unilateral denunciation can be pleaded by the aggrieved State under the doctrine of *rebus sic stantibus*. On the other hand, if the constituent instrument is silent regarding withdrawal, or lays down an express method of withdrawal, it is possible for the State to get its release from its obligations by withdrawing according to the correct procedure. Thus in both those cases, as well as in the event of a machinery for revision of a *status quo* by peaceful means being provided, it would not be possible to make use of the doctrine of *rebus sic stantibus*. In fact, there is no occasion for a State to do so when an escape clause exists. It is only when the machinery for amendment or revision provides no remedy and withdrawal is also barred that a member-State is compelled to resort to the plea of *rebus sic stantibus*.

Another reason why the doctrine of *rebus sic stantibus* has a very limited application to constituent instruments is that, fully applied, the doctrine would result in the automatic expiration of the organisation rather than provide an option to one of the parties to withdraw from it. If the true intention of the parties was the continuance of the organisation on the basis of the existence of certain conditions, the doctrine would only give effect to

the natural result of the contract when new circumstances came into existence. In that sense, the doctrine could not be invoked by an individual member-State for its personal withdrawal and could only be invoked to dissolve the entire organisation. This must be the inference because, so understood, the doctrine would confer no special rights on any particular member as against others. Again, in the case of treaties which do not give birth to international organisations, there is evidence, particularly as gathered from the United Kingdom practice, that a vital change in their specific *raison d'être* would be a legitimate ground for recognising their *ipso facto* termination.[27] As applied to constituent instruments, one can visualise dissolution when the very object or purpose for which the organisation was created has ceased to exist. Thus, for example, an organisation brought into existence to regulate and control commodities like coal and steel could be considered for all practical purposes to be *ipso facto* dissolved if the coal and steel deposits in the territories of those member-States become exhausted. However, even in that event, a formal resolution liquidating the organisation would perhaps be necessary. Thus, by and large, the criticism of Fischer Williams in regard to the operation of this doctrine is vindicated in treaties of the type now considered.[28] However, it would not be incorrect to say that in relation to international organisations *rebus sic stantibus* provides a method of declaration of obsolescence of treaties caused by their expiration.

But it would not be right to suppose that individual members could, in no case, resort to this plea. Apart from a change in the political status of the contracting party, which is discussed below, there is the possibility of a very exceptional change in circumstances entitling the individual member-State to withdraw or the organisation to expel it. Thus, for example, if a military organisation like MEDO was formed with States A and B as members, among others, and as a result of internal revolutions in their respective countries State A installed a Communist Government in power and State B as a result of change in Government wanted

[27] See McNair, *Law of Treaties* (1938), p. 379.

[28] Sir John Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929) Chapter IV, pp. 88–90. The writer does not make special reference to the problem discussed in the text. See also same author in A.J.I.L., Vol. 22 (1928), pp. 89 *et seq.*

to pursue a neutral foreign policy, it would be correct to say that State A would be entitled to withdraw, failing which it would run the risk of expulsion from the organisation. This must be the conclusion because the basic condition of constituting an anti-Communist front which would be the object of MEDO would no longer be fulfilled as a result of the vital change in circumstances resulting in the establishment of a Communist régime in that State. *Rebus sic stantibus* would apply not to dissolve MEDO but to entitle the organisation to expel the " Communist-converted " member-State from the organisation if it did not voluntarily withdraw from it. However, in the event of a change in Government leading to a change in its foreign policy as in State B, *rebus sic stantibus* could not be pleaded because treaties are concluded to be respected irrespective of changes in governments. But the member-State could certainly plead any change in circumstances as threatening its vital existence and thereby compelling a change in its foreign policy. Thus if State X, a neighbour of State B, makes an alliance with State R and thus threatens the existence of State B, the latter may have to resort to a neutral foreign policy because of the proximity of the danger from States X and R. *Rebus sic stantibus* could then be invoked by State B with a view to being relieved from the obligations of membership of MEDO.

There are also other minor applications of this doctrine to international organisations, such as when changed conditions affect the political status of a contracting party. This would not dissolve the organisation as such, but would certainly lead to the termination of membership of the individual State whose status undergoes a definite change. This aspect could best be discussed in relation to the effect it creates, although the cause could be generally described as coming under the heading of *rebus sic stantibus*. For example, in ordinary types of treaty, extinction of a party or subsequent change of status would result in voidance or cancellation of the treaty. In an international organisation the position would of course be different. However, as the effect of change in the political status of a contracting party results generally in voidance and cancellation, this aspect may best be examined while considering those methods of termination.

(8) *Voidance*

A treaty can lose its binding force if it becomes void for reasons recognised in international law. These may be briefly summarised as follows :

(i) First, if in a bilateral treaty one of the contracting parties becomes extinct the treaty becomes void provided it does not devolve upon the new State. This contingency cannot be contemplated in the case of treaties giving birth to international organisations which are multilateral in character. However, in the event of a member-State becoming completely extinct, the organisation would not undergo any change except to the extent of loss of membership of the extinct State. Again, if the disappearance of the State was the result of conquest, and hence an international wrong, the position would be quite different. This aspect is discussed later in relation to change in condition of the status of a contracting party, but suffice it to say in this context that extinction of one of the contracting parties to a multilateral constituent instrument would not lead to the voidance of the entire treaty which established the international organisation.

(ii) Secondly, it is argued that a treaty becomes void because of the impossibility of executing it after its conclusion. This condition would also be generally inapplicable to the class of treaties which form the subject of our study. However, the effect of war on even those treaties which give birth to international organisations may be to make it impossible for the organisation to function and thus lead to suspension of the treaty but not to its cancellation. This aspect is discussed subsequently. In any case, it is difficult to visualise an organisation becoming *ipso facto* void on the ground of impossibility of performance. If as a result of a vital change in circumstances it had lost its purpose and could not function, it might have to be wound up by a resolution of its own organs, as described earlier.

(iii) Thirdly, realisation of the purpose of the treaty other than by fulfilment may make an ordinary treaty void, but would have no application to a constituent instrument. Even if the purpose is realised, in the normal course, a resolution liquidating the organisation is generally considered necessary.

(iv) Lastly, a treaty is said to become void if its object is extinguished. However, an international organisation is rarely

contemplated in relation to a physical object, though it may have a definite purpose and a function. But even in the case of the extinction of a physical object, it is quite possible that the members of the organisation would assemble to liquidate it by a resolution rather than treat it as extinct *ipso facto*. For example, if an international organisation was created for atomic control and as a result of certain scientific discoveries the atom lost all its dangerous or destructive aspect, it would still seem preferable to liquidate the affairs of the body through its own machinery. The example of coal and steel deposits becoming exhausted so as to render the European Coal and Steel Community defunct may also be cited here.

(4) *Cancellation*

Cancellation is also a recognised method of termination and operates as follows :

(i) When the treaty becomes illegal or inconsistent with international law

It is difficult to visualise a constituent instrument becoming contrary to international law, but if it does, there can be no question of the organisation becoming illegal in purpose. For example, if NATO were to change its objects and purpose so as to make them inconsistent with the United Nations Charter, the Organisation could be cancelled by any member on the ground of inconsistency with the United Nations Charter, which would be the higher law. The inconsistency may, in that case, justify unilateral denunciation by a member-signatory of NATO on the ground that the treaty must be deemed cancelled in law.

(ii) Abrogation

Secondly, if one of the contracting parties violates a treaty it gives discretion to the other to cancel it on that ground. It must be stated that the mere fact of violation of a treaty by a party would not cancel the treaty. However, according to the decision of the United States Supreme Court in *Charlton* v. *Kelly*, it confers discretion on the other contracting party to resort to cancellation of that treaty if it so desires.[29] This is the same as abrogation, and the practice has been recognised in both the

[29] 229 U.S. 447.

United Kingdom and the United States. However, it is not available when failure to perform the treaty results from the illegal act of the other party which obstructs performance. The decision of the Permanent Court of International Justice in the *Case Concerning the Factory at Chorzow* may be cited as an authority.[30] However, abrogation by a member-State of a constituent instrument would in no case cancel an international organisation, but on the other hand it would empower it and its members to resort to measures of redress which attend the commission of an international wrong. The main difference, therefore, is that, while, according to the decision in *Charlton* v. *Kelly*, the other contracting party gets the option of annulling the treaty at its discretion, in an international organisation, violation of the constituent instrument by one of the contracting parties would not cancel the treaty, but would only enable those measures to be taken against the defaulting State which are stipulated in the constituent instrument or are permissible under customary international law. Thus, violation by one party can in no circumstances cancel a treaty which establishes an international organisation.

(iii) Change in status of one of the contracting parties

Again, if a contracting party undergoes a change in political status after ratifying the treaty, it may result in cancellation of the treaty if it does not establish an international organisation. Thus, for example, if a State loses its international personality by conquest, annexation or by entering into a federal union, all its treaties of alliance would stand cancelled. It is necessary to examine this method of termination in relation to international organisations. A change in the political status of a contracting party could be brought about by any of the following methods[31]: (a) complete annexation; (b) passing under the protection of another State; (c) becoming a member of a federal State; (d) becoming a member of a union of States; (e) political dismemberment.

In the event of complete annexation or merger of a member-State, there can be no doubt that its membership would be lost, although the organisation would continue unaffected. If the

[30] P.C.I.J., Decision 1927, Series A, No. 9, p. 31.
[31] McNair, *op. cit.*, p. 389.

annexation or merger of the member-State had taken place contrary to international law, *de jure* recognition would not be granted unless the international community was powerless to redress the international wrong. Thus, in immediate effect, merger or annexation of a member-State would deprive the organisation of the membership of that extinct State, but would not permit any other member to resort to cancellation of the constituent instrument.

Again, the loss of international personality of the member-State in any other way, such as passing under the protection of another State or becoming a member of a federal State, would have the same legal effect of terminating its individual membership without in any way affecting the continuance of the organisation. It would give no right to the other members to resort to unilateral denunciation of the organisation.

However, if the annexation or merger were legally brought about and the creation of the protectorate as well as the membership of a federal State were the result of the voluntary surrender of power by the member-State, it would be correct to presume that the new State would have to accept the territorial commitment and obligations connected with the extension of its boundaries consequent upon such union or merger, as the case may be. In this respect, the practice of the United Kingdom has been to hold the protecting State bound by the treaties entered into by the State before it accepted protection. Thus if State X, a member of an international organisation, passed into the protection of State Y, also a member of the international organisation. the effect would be to constitute the territories of X and Y into a single entity, *viz.* Y, which would continue to exist as a member of the international organisation although X would lose its membership. However, if Y was not a member of the international organisation, X's passing into protection would terminate its membership but would not make Y a member unless the organisation was prepared to accept it in accordance with its rules. To that extent a treaty which establishes an international organisation does not devolve upon the protecting State as any other treaty would.

The same remarks would apply to a federal State. The only example we have relates to a treaty of 1840 between Great

Britain and the Republic of Texas, when the former held that the entry of the State into a federal union completely extinguished the treaty obligations of the federating State.[32] In short, the basic principle is that when a member of an international organisation loses its international personality, it ceases to be a member. If it loses its personality in favour of another State, the latter does not become a member merely on that ground, but if it is already a member, it becomes liable in respect of the new territories that have become a part of it.

However, the same cannot be said if a member-State of an organisation joins a union of States of the type of Denmark and Iceland. The international practice appears to be that pre-union treaties which bound the new member of the union would continue to bind it after its entry into the union. Thus, if Iceland was a member of an international organisation before its union with Denmark, it would continue to be so even after the union. It is essential to emphasise here that much would depend upon the nature and character of the union and the extent to which it affected the international personality of the member-States. On the analogy of the Republic of the Ukraine continuing to be a member of the United Nations, it is obvious that a loose union of the type of Iceland and Denmark would not impair the international personality of Iceland. For example, Burma is a member of the United Nations, but if it entered the Commonwealth of Nations it would certainly not cease to be a member.

The effect of the political dismemberment of a member-State of an organisation would be difficult to formulate into any legal principle, because much would depend upon each individual case. For example, India was a member of the League of Nations as well as of the United Nations before 1947, when the Indian Independence Act, 1947, partitioned the country, as a result of which Pakistan, a new State, was created. Though the territories now occupied by Pakistan were a part of the pre-1947 India, it was considered necessary for Pakistan to apply for membership of the United Nations, while India continued to be a member without a formal application after partition. This was legally permissible because the political dismemberment resulting from the Indian Independence Act, 1947, did not materially affect its continuance

[32] McNair, *op. cit.*, pp. 393–395, 435.

after partition. In the case of Pakistan, however the legal position was that a certain part of India had become independent and having obtained international personality had to seek membership of the United Nations.[33] Thus much would depend upon the nature of dismemberment. However, the dismemberment of a particular member-State does not affect the international organisation in any way except for loss of membership of an individual State or the creation of additional members of new States, if it agrees to accept them. If the dismemberment is of such an order as to extinguish the former member-State and create three new States in its place, none of the new States would *ipso facto* be entitled to membership of the international organisation. It is only when a particular link can be found between the former State and the one which has been left after dismemberment that membership of an organisation can be regarded as intact.

(iv) Effect of war on treaties

Again, although war is supposed to cancel treaties, the law on the subject is still unsettled. There is a difference of opinion not only between jurists but also in international practice on the exact effect of war on various types of treaty. In order fully to appreciate the effect of war on treaties which establish international organisations, the position in regard to treaties in general from the viewpoint of both theory and practice may briefly be stated.

No uniformity of Opinion

While Phillimore [34] and Twiss,[35] in conformity with the earlier writers on the subject, have held the view that "by the Law of Nations war abrogates all Treaties between the belligerents,"

[33] Pakistan took the view that it acquired membership automatically. The procedure adopted by the United Nations was taken in order to save delay and is consequently a doubtful precedent. For a summary of this matter and the view of the Sixth Committee on the general problem, see *Repertory of Practice of the United Nations Organs*, Article IV of the Charter, pp. 175–176.

[34] Phillimore, *Commentaries upon International Law* (3rd edition, 1879–1888), Vol. III, p. 194.

[35] Twiss, *The Law of Nations* (2nd ed., 1875), Vol. 1, par. 252. *Cf.* the Report of January 13, 1854, by Sir J. D. Harding, Queen's Advocate, quoted by McNair, *op. cit.*, p. 533.

Hall,[36] Oppenheim [37] and McNair [38] have acknowledged the fact that there are several exceptions. For example, treaties concluded for war like the Hague Conventions or those setting up a permanent condition of things, particularly if they are of the multilateral type and more so if organisational in pattern, are certainly not *per se* cancelled by the outbreak of war. This aspect is examined later when describing the existing position in relation to international constituent instruments.

Again, Sir Cecil Hurst,[39] at one time Legal Adviser to the British Foreign Office, has suggested that the crucial test is " intention of the parties at the time when they conclude the treaty, rather than the nature of the treaty which they concluded," which determines whether a particular treaty will survive an outbreak of war between the parties. Lord McNair is, however, of the opinion that the nature of the treaty is clearly the best evidence of the " intentions of the parties " and in a vast majority of cases, therefore, " either test would give the same result." [40] Although, in a sense intention determines certain broad categories according to which treaties may be classified, it would be wrong to look no further than general characteristics, such as whether a treaty is bilateral or multilateral, for such distinctions do not always reflect the particular intention which is sought to be ascertained, *i.e.*, whether it is intended to keep a treaty alive on the outbreak of hostilities. Thus, for example, in spite of the general rule that multilateral conventions of the organisational or law-making type are not affected by war, the British Government were advised in World War I that Article 4 (i) of the Universal Postal Union should be suspended as between the belligerents. Intention is, therefore, the basis and though the nature of the treaty may be a good evidence of intention, the latter cannot be replaced at any stage by the former as a criterion governing the continuance of a treaty, whether it gives birth to an international organisation or not, with reference to the outbreak of hostilities.

Again, it is a controversial point whether the effect of war upon certain treaties is attributable to the operation of a rule of

[36] Hall, *International Law* (8th ed. by Pearce Higgins, 1924), pp. 453–460.
[37] Oppenheim, *International Law*, Vol. II (7th ed., by Lauterpacht, 1952), p. 302.
[38] McNair, *op. cit.*, p. 530.
[39] Hurst, B.Y.I.L., 1921–1922, pp. 37–47.
[40] McNair, *op. cit.*, p. 532.

law or to the intention of the parties to which the law gives effect. Writing in 1938, Lord McNair commented that the "United Kingdom Government has not found it necessary to express an opinion on this interesting theoretical point," although, according to his opinion, it was easier to base legal theory connected with this difficult subject upon the "supposed effect of rules of law rather than upon the intention of the parties at the time of contracting."[41] On the other hand, Sir Cecil Hurst has held the view that intention is the guiding factor in this sphere.[42] Perhaps both are right in their own way, but it is submitted that so long as the international community does not crown *lex* as *rex* and permits States to remain fully sovereign, it is preferable to relate their obligations to the more obvious and hence more convincing and durable bond of their own intention, rather than an unsettled or unacceptable rule of law, particularly if the intention is abundantly clear from the instrument. However, when the intention of the parties cannot be clearly or unambiguously ascertained, it is necessary to fall back upon the rules of law governing the construction of treaties. Thus the controversy could best be reconciled in this way.

No Uniformity of Practice

Again, international practice has been equally divergent though States have more often than not regarded all treaties as cancelled on the outbreak of hostilities. Thus, for example, in 1815, Lord Bathurst, assessing the effect of the war of 1812-14, is reported to have said that Great Britain "knows no exception to the rule that all treaties are put an end to by a subsequent war between the same parties."[43] Again, in 1817, Lord Stowell observed "treaties, however, it must be remembered, are perishable things, and their obligations are dissipated by the first hostility."[44] Similarly, Spain, in 1898, regarded all treaties as annulled on the outbreak of war with the United States of America.[45] In 1911, Turkey followed suit at the outbreak of the war with Italy.[46] It appears that States have found it convenient

[41] *Op. cit.*, pp. 531 and 551.
[42] *Ibid.*
[43] Cited by Moore, *Digest of International Law*, Vol. v, p. 383.
[44] In *Le Louis* (1817) 2 Dods. 210, 258.
[45] Moore, *op. cit.*, Vol. 5, pp. 275–380.
[46] Hurst, *op. cit.*, p. 45. Hall, *op. cit.*, p. 455.

to free themselves from the obligations of a treaty which is burdensome by raising the plea of the outbreak of hostilities. As the law on the subject is still very much unsettled, it is possible for States to take advantage in order to abrogate burdensome treaties, but it would not be proper for courts to recognise the right of an aggressor State to abrogate or suspend, for its own benefit and the benefit of its nationals, the terms of any treaty which are affected by the outbreak of war particularly if that State is responsible for initiating the war in violation of its obligations. Moreover, it must be stated that the above-mentioned declarations of States relate to bilateral treaties and hence, it is submitted, cannot have any bearing on international organisations. Thus the legal position regarding constituent instruments will be examined separately. However, it has been necessary to set out the general principle since as yet no distinction has been made in international practice between those treaties which establish international organisations and other treaties.

No uniformity of case law

Again, even the decisions of the municipal courts of the various nations of the international community do not present an agreed solution to the problem of effect of war on treaties. For example, some of the recent French decisions of the Court of Cassation like the one in *Lovera* v. *Rinaldi*,[47] decided in 1949, have gone a long way to establish a rule which affirms the abrogation of a treaty as a result of war. The French courts have from time to time admitted a few exceptions, although they are not supported by a uniformity of decisions, in the case of some private rights arising from treaties of a purely private law nature which have no bearing on the conduct of hostilities.[48]

However, American case law has helped the formulation of a definite legal principle and has thus made a valuable contribution towards the attainment of precision on this unsettled and controversial subject of international law. In the celebrated case of

[47] Clunet 77 (1950) p. 123. For criticism of the judgment, see Scelle, *ibid.*, pp. 72–82.

[48] Most of the earlier decisions must be viewed with some caution in the light of the above decision of the Plenary Court of Cassation which resolved the conflict between the social and the civil chambers on this question. For a history of the development up to 1948 see La Pradelle, *International Law Quarterly*, 1948, No. 2, 55 *et seq.*

Hughes v. *Techt* [49] it was laid down as early as 1920 by Cardozo J. that " provisions compatible with the state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected," and the decision was later affirmed by the Supreme Court. This crucial test of compatibility with hostilities has been consistently followed by the municipal courts of the United States. Thus in 1926 the same principle was affirmed in *State of Kansas* v. *Reardon*.[50] Again, in *Meier* v. *Schmidt* (a decision of the Supreme Court of Nebraska of 1948), it was held to be a " general rule that treaties which are reasonably practicable to execute after the outbreak of hostilities must be given effect to." [51] There are several similar decisions of the Supreme Court of the United States, like *Allen* v. *Markham* [52] and *Clark* v. *Allen*,[53] which base their *ratio decidendi* on this very principle of compatibility with hostilities.

Again, it is interesting to note that some of the decisions which go to abrogate a treaty as a result of war are such that they can be supported by the application of this very test. Thus, for example, it was held in *Zenso Arakawa et al.* v. *Clark* (1947) [54] that the war with Japan had abrogated the Treaty of Commerce and Navigation with that country, because enforcement of the treaty would have involved communication across the line of war and hence would have been inconsistent with the accepted tenets of the laws of war.

As a treaty is basically an international contract between States or their Governments, the English law on the subject to the effect that contracts which require for their execution intercourse across the line of war between belligerent parties are illegal and void may be said to support the validity of the test of compatibility. Thus a contract of partnership, *vide Hugh Stevenson and Sons* v. *A. G. für Carbonnagen-Industrie* (1918),[55] or of fire insurance as decided in *Excess Insurance Company Ltd.* v. *Mathews*,[56] and even pure agency contracts as was settled in

[49] 254 U.S. 643; 229 N.Y. 222; *Annual Digest*, 1919–1922, Case No. 271.
[50] 120 Kansas, 614; *Annual Digest*, 1925–1926, Case No. 332.
[51] 34 N.W. (2d), 400.
[52] 67 Supreme Court Reports 1431.
[53] 331 U.S. 503.
[54] 47 F. Supp. 468.
[55] [1918] A.C. 239 (H.L.).
[56] Branson J. (1925) 31 Com. Cases 43; 23 *Lloyd's List Reports*, p. 71; *Annual Digest*, 1927–1928, Case No. 366.

Maxwell v. *Grunhut*,[57] are abrogated on the outbreak of war for the basic reason that their performance would involve the prohibited intercourse across the line of war. Again, if it is incompatibility with hostilities which abrogates contract, it is the basic consideration of partial compatibility at least which permits those which involve rights of property to be suspended but not abrogated. Thus, for example, in *Robson* v. *Premier Oil Company*,[58] the Court of Appeal decided that the alien enemy shareholders of an English company could not exercise their right of vote by proxy or be entitled to receive dividends during the war, but the case did not decide cancellation of the contract as such. The decision in *Seligman* v. *Eagle Insurance Company*[59] would warrant the inference that the rights of an alien enemy are only in suspense in the case of a life insurance policy also.[60]

Thus, on the whole, this crucial test of compatibility with hostilities applied not only to contracts but also with equal force to treaties which establish international organisations. Organisations which require for their effective functioning communication between belligerents across the line of war would definitely be affected during hostilities and the question of their temporary suspension or termination would depend upon the nature of the

[57] Court of Appeal (1915) 31 T.L.R. 79; 59 *Solicitor's Journal* 104, followed in *Re Gaudig and Blum* (1915) 31 T.L.R. 153.

[58] [1915] 2 Ch. 124.

[59] Neville J. [1917] 1 Ch. 519.

[60] The position in English law is complicated by the need to give effect to the intention of the parties so far as this is consistent with public policy, and the court will not "substitute a different contract": see *Distington Hematite Iron Co.* v. *Possehl and Co.* [1916] 1 K.B. 811, 813, McNair, *op. cit.*, pp. 98–99. There have also arisen analytical and terminological difficulties from the effort to give precision to the term "suspension" on the one hand (*ibid.*) and the desire on the other hand to categorise the legal relations, which in one sense or another give rise to "suspension": see the above case and also the following:—*Ertel Bieber and Co.* v. *Rio Tinto Co.*, *Dynamit Act.* v. *Same etc.* [1918] A.C. 260; *The Fibrosa Case* [1943] A.C. 32; *Schering, Ltd.* v. *Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219; *Arab Bank, Ltd.* v. *Barclays Bank (Dominion, Colonial and Overseas)* [1954] A.C. 495. In the last case, the House of Lords, though unanimous in its decision, was divided on the theoretical grounds for survival of rights (arising from contract) after war: Lords Reid and Cohen adhered to the traditional basis of "accrued rights"; Lords Morton and Asquith adopted the view expressed in McNair, *Legal effects of War* (1948 ed. p. 93). Probably Lord Tucker came nearest to the root of the problem in putting the question firmly on the basis of general public policy. It might well be said that the rival theories represent an attempt to reduce the instances of compatibility to formal categories. The 21st ed. of Chitty on *Contract*, 1955, compromises by lending support to both theories. See pp. 617–618.

organisation, whether temporary or permanent, and the character of the parties, whether belligerents only or neutrals also. This aspect is fully discussed subsequently. It is enough to indicate here that Bluntschli's codified dictum " treaties lose their efficacy in war only if their execution is incompatible with war " (section 538 of *Droit International Codifié*) is a principle which operates on every kind of treaty, because war, being a supervening legal situation, must render ineffective any rights and obligations the execution of which conflicts with the laws of war. Thus inconsistency with hostilities should always be regarded as an effective test.

The effect of war on constituent instruments

As international organisations are established by multipartite treaties, the effect of war on this particular class only need engage our attention. Multipartite treaties may broadly be classified into three categories, namely :

(1) multilateral conventions which are law-making in character;
(2) multipartite treaties constituting an international régime or status; and
(3) those establishing international organisations.

By their very nature all three types of multipartite treaty would, more often than not, have belligerents as well as neutrals as parties. However, a multilateral treaty having belligerents alone as signatories cannot be ruled out. As the question whether the parties are belligerents or not is a factor of some importance, the legal position has been examined on the basis of this distinction.

Although our principal concern is with the last type, the position in regard to the other two kinds of multipartite treaty may also be stated, as it throws light on the nature of the category under consideration.

Multilateral conventions law-making in character

Multipartite conventions or law-making treaties which formulate rules for the future conduct of nations are not affected by a war, irrespective of whether all the contracting parties or some

of them only are belligerents. In this category can be cited the Declaration of Paris of 1856[61] or the General Treaty for the Renunciation of War of 1928.[62] Even Conventions which lay down rules regarding nationality or marriage and Labour Conventions or Civil Aviation Conventions would probably come under this category. In this connection it is essential to mention that the United Nations Organisation is regarded as a *traité-loi* and, because of its global character, it can be said to constitute universal international law. Thus, it could be stated that universal or global organisations of the type of the United Nations would be unaffected by war although, if they are not effectively able to control the outbreak of hostilities or to punish the aggressor, they may soon lose their *raison d'être*, as happened in the case of the League of Nations.

Multipartite treaties constituting an international régime or status

In regard to multipartite treaties constituting an international régime or status, it could be inferred that the intention of the parties was to create a permanent condition of things and such treaties could, therefore, survive a war irrespective of whether all the contracting parties were belligerents or not. Thus the neutralisation of Switzerland,[63] which has stood the test of two world wars, may be quoted as an example. It is however true that the effect of war may be to alter the international régime or status but the outbreak of hostilities as such could not annul a multipartite treaty of that nature.

Multipartite treaties establishing international organisations

The effect of war on constituent instruments which establish international organisations, would depend upon two important factors, *viz.* (a) whether the organisation is intended to be (i) permanent; or (ii) a temporary one, and (b) whether the contracting parties are (i) all belligerents; or (ii) some neutrals coupled with some belligerents only.

[61] Martens, N.R.G., 15, p. 767.
[62] Treaty Series No. 29 (1929) Cmd. 3410.
[63] See Martens N.R. II, pp. 157, 173, 419, 740.

Where international organisation is permanent—In regard to organisations which are of a permanent nature, there can be no question of *ipso facto* dissolution on the outbreak of hostilities irrespective of whether all the contracting parties are belligerents or not. Again, in accordance with the legal test formulated by American case law, if the functions of such an organisation are not incompatible with the existence of hostilities, the conclusion should be that the organisation must continue unaffected. As even political treaties, which are intended to create a permanent condition of things, are not cancelled by the outbreak of war, it is safe to say that treaties which give birth to international organisations of a permanent nature would at the most be suspended, either totally, if all contracting parties are belligerents, or partially, if there are non-belligerents also, but there can be no question of annulment *per se*. Organisations which confer reciprocal benefits or render services to member-States would, to the extent of involving contact between belligerents across the line of war, be suspended, but not in respect of neutral contracting parties *inter se*. Thus, for example, the effect of the Franco-Prussian War of 1870 on the General Telegraphic Conventions of 1865 and 1868 was, in the opinion of English jurists, to suspend the operation of the Convention as between the belligerents. However, as between each of them and a neutral State, the Conventions were said to contain an implied term which subordinated the express provisions to the duties of a neutral State as prescribed by the laws of impartiality. Referring to multilateral treaties of the type of the International Telegraphic Conventions which have belligerents as well as neutrals as contracting parties, Sir Travers Twiss gave his opinion to Earl Granville in 1870 that these treaties are suspended on the occurrence of war between any of the parties but "revive at the return of peace."[65] This legal conclusion is based on the presumption that it could not have been the intention of Prussia to bind itself in the event of a war with France to convey public despatches of its enemy after the outbreak of hostilities.[66] This

[65] See McNair, *Law of Treaties* (1938), pp. 534 and 535.

[66] In the International Convention for the Protection of Submarine Telegraph Cables of 1884, Article 15, freedom of action is reserved to belligerents. Martens N.R.G. 2nd Series II, p. 210. See further Higgins "Submarine Cables and International Law," B.Y.I.L., 1922, p. 27, and Tobin, *The Termination of Multipartite Treaties*, 1933, p. 77.

would be a correct inference to draw in the case of international organisations because it must be presumed that they exist for the general advantage of all parties, and, in the absence of express provision, they could not be construed to cause any injury to a party or to violate the laws of neutrality if the international situation had changed from peace, when the treaty was signed, to war, when the question of interpretation arose. Another example is that of the Universal Postal Union, which had belligerents as well as non-belligerents as its high contracting parties. During World War I, the British Government accepted the fact that Article 4 (i) of the Postal Union had been suspended as between the belligerents themselves,[67] presumably, on the ground that it was an international organisation, which could operate fully or in its entire field only during peace.

Moreover, international organisations of a military character, like NATO, which are intended for the purpose of war, can, in no circumstances, be affected in any way whatsoever by the outbreak of hostilities. This type of treaty meant for war is, in this respect, akin to the Hague Conventions relating to war or the Geneva Conventions relating to Prisoners of War.

Where international organisation is temporary—Those temporary international organisations which have to function across the line of war would be annulled *de facto* if not *de jure*, particularly if all the contracting parties were belligerents. However, the test of compatibility with hostilities would also have to be applied, and even if the functioning of the temporary organisation were not inconsistent with the state of hostilities, it would depend upon the intention of the belligerents whether it remained alive or became suspended or dissolved. However, if such an organisation, though temporary in character, was contemplated for war or concluded with the intention of coming into operation during war, it would be safe to infer that it would be completely unaffected by the outbreak of hostilities. Again, temporary international organisations, which have non-belligerents as parties, may be suspended in relation to the belligerent member-States but would probably require a resolution of the appropriate organ before they could be dissolved. This should be the conclusion,

[67] McNair, *op. cit.*, pp. 535-536. See further, Tobin, *ibid.*, p. 75.

because the interests of third parties would be involved in the event of an automatic dissolution. The same cannot, however, be said when all the parties are belligerents and the temporary organisation happens to be inconsistent with the existence of hostilities, in which event it would in actual fact be treated as cancelled though *de jure* it might need a resolution to liquidate it.

Where parties are all belligerents—When belligerents only are parties to multilateral treaties the British attitude in 1919 was, according to the rather cautious view of Lord McNair,[68] probably that such treaties are abrogated by the outbreak of war and do not revive unless specifically provided by the Treaty of Peace. This conclusion, if valid, would apply to treaties which give birth to international organisations also, because if an international organisation had belligerents only as its members the Peace Treaty would naturally have to give its verdict after the cessation of hostilities.[69] However, it is impossible to be dogmatic because much would depend upon the nature of such treaty—whether it was permanent or temporary, or consistent or incompatible with hostilities. Unless the organisation was contemplated for war, the probability is that it would cease to function during the period of belligerency for the obvious reason that all its member-States, being belligerents, would be preoccupied with war. Thus, irrespective of whether it was permanent or temporary, a specific provision for revival would certainly be not out of place in any Peace Treaty. As a general rule, it could be said that even if an international organisation had belligerents only as its members, it would probably be revived on the cessation of hostilities.

[68] *The Law of Treaties* (1938), pp. 549–550.

[69] The Juridical Commission of the Peace Conference after World War II formally placed on record and inscribed in the Minutes that, in general, multilateral conventions between belligerents, particularly those of a technical character, are not affected by the outbreak of war as regards their existence and continued validity, although it may be impossible for the period of the war to apply them as between belligerents. See Fitzmaurice "Political Clauses of the Peace Treaty," *Hague Recueil* (1948) II at p. 316. The writer regards this as an over-simplification. He puts treaties between belligerents alone on the same basis as bilateral treaties. See *ibid.*, pp. 316–317.

Where some parties are neutrals—However, different considerations apply to multilateral treaties which have neutrals as well as belligerents as its members. If the precedent of World War I is to be quoted, this class of treaties remained in operation during the war between Great Britain and the neutral parties though they were suspended as between Great Britain and enemy parties. Thus an international organisation, which has neutrals also as its members, may have to suspend its functions *vis-à-vis* belligerent members but would certainly continue to function as between neutrals or between neutrals and warring parties, subject to the overriding consideration of due observance of the laws of neutrality.

There would be no necessity for the revival of such international organisations because they survive the period of war. These treaties, which establish international organisations on account of their having neutrals as members, present a case of survival and do not have to be revived by the Peace Treaty. Thus, for example, the treaties of 1839 relating to the neutralisation of Belgium [70] were regarded as having survived World War I,[71] probably because of the fact that Holland, a neutral State, was a party to it. It is more logical to attribute the above-mentioned effect to the existence of neutrals as parties, rather than to the dispositive nature of the treaty, because the basic consideration is the interests of third parties, and the dispositive nature of the treaty is merely an attendant condition. However, there can be no objection to a Peace Treaty specifically reviving any multilateral treaty, including the type described above, because the object should always be to leave nothing ambiguous, and the insertion of a provision *ex abundanti cautela* in a peace treaty would be justified, even though the multilateral treaty establishing an international organisation may have survived a war in any case.[72] Thus the revival of such treaties could be the result of an express stipulation in the Peace Treaty or, even when the latter is silent,

[70] Martens N.R. XI, pp. 394 and 404, *ibid.*, XVI, p. 770.

[71] Revue Générale de D.I.P. (1916) Documents, p. 126; Treaty of Mutual Guarantee, October 16, 1925, preamble, *British and Foreign State Papers*, Vol. 121, p. 923.

[72] Naturally any attempt to modify or cut down the rights of neutrals by a peace treaty would not be binding on the neutral without its consent.

their survival or continued existence could be assumed. This was the case in the Treaties of Peace of 1919 and 1947. In Articles 282 and 286 of the Treaty of Versailles, some fifty multipartite treaties are enumerated as coming into force. However, in the Peace Treaties of 1947 multilateral treaties were not mentioned but their continued existence was assumed.[73]

(5) *Desuetude*

Desuetude and *force majeure* are the other two methods of termination of treaties known to customary international law, but neither of them can be said to apply appropriately to international organisations. Desuetude, although essentially applicable to types of treaties which do not establish international organisations, may be invoked by a member-State to plead its effective withdrawal from an international organisation, if after notice it ceases to attend meetings or to have anything to do with the organisation and the latter, by taking no further steps in this regard, acquiesces in it. Thus, if for example, the Soviet Union, the Ukraine Soviet Socialist Republic and Poland, Hungary and Czechoslovakia, which withdrew in 1949 from UNESCO and WHO, had been suddenly asked by the Organisations concerned to pay subscriptions and other dues of membership, it could have been pleaded by the withdrawn member-States that the Organisations by not sending them an agenda or notice of meetings had acquiesced. However, in actual fact the Organisations took good care to continue to treat these withdrawn States as members.[74] In the case of *Yuille, Shortridge and Company Claims*,[75] it was decided that desuetude required an express act on the part of the Government against which termination was claimed. The Organisation being composed of sovereign member-States could be regarded as having the capacity of a Government in relation to the Government of the member-States. The failure of the Organisation to send notices and agendas of the meetings would be the omission of a necessary act which could only be explained on the ground that it had ceased to treat these States as members of the Organisation. It is thus possible to visualise the relevancy of the plea of desuetude

[73] See Fitzmaurice, *op. cit.*, pp. 301–317.
[74] See Chap. 6.
[75] 2 Arb. Int., p. 96.

in such hypothetical circumstances, particularly if the Organisation had persisted in its default by not sending agendas for a number of years and yet wished to claim subscriptions from the withdrawn member-States. The plea of desuetude in such a case may be held valid, even if withdrawal is barred by a constituent instrument, particularly if the Organisation took no action expressly contemplated by the constituent instrument or available in customary international law in such an eventuality.

Chapter 9

CHINA AND THE UNITED NATIONS

The United Nations is a global organisation of the permanent type and its constituent instrument signed by the vast majority of the nations of the world has been described by jurists as furnishing a typical illustration of a *traité-loi*. Its Charter is a solemn treaty of the inter-State type, as opposed to the inter-governmental one, and is often described as laying down " universal international law " around which is spun the legal theory of the " Charter as a Higher Law." If in any particular case the maxim *pacta sunt servanda* should effectively overrule Immanuel Kant's objection to international law that it is a " word without substance and treaties are observed in their breach," it is the case with the United Nations Charter. Thus, it is in the light of all the sanctity that can be attached to this basic international document of modern times that China's claim to membership of that world organisation must be considered.

In 1946 when China signed and ratified the Charter, it became a permanent member of the Security Council—the principal executive organ of the United Nations—apart from taking its due place as a member of the General Assembly and of the various Specialised Agencies of the United Nations. In sharp contrast to that position in 1946, it is found today that China as represented by the Government on the mainland which is the only truly effective Government of China has, for all practical purposes, having lost her right of representation, ceased to be a member of the United Nations and has thus been deprived of her permanent position in the Security Council, though, in actual fact, she continues to be a " Big Power." This presents a serious problem not only from the political and the legal viewpoints but also from the narrow perspective of international organisations, because, if this precedent is followed, it would indeed by easy for any State to lose its membership despite its ratification of a solemn treaty, namely, the constituent instrument of the organisation, which it may at no stage have violated in a manner deserving

such treatment. Thus the centre of gravity of the problem is not one of pure " recognition of governments," but one which involves the termination of the membership of a State in an international organisation, particularly when that State, on its part, by solemn ratification of the treaty, had agreed to discharge faithfully the obligations of membership and also exercise the rights conferred on it by the constitution. Again, the organisation, on its part, must be deemed to have accepted the recognised position that the effective representatives of its member-States would staff the organisation on the latters' behalf. There are several legally recognised methods of termination of membership of international organisations, but the refusal to admit the representatives of the established government of a member-State is a complete constitutional innovation involving, as will be seen later, a violation of the United Nations Charter itself.

The procedure followed by the United Nations in determining the Chinese People's Republic's right to representation has throughout been unassailable, but it will be convenient to set out the procedure which has been followed before entering upon any extensive discussion of matters of substance.

Procedure

There can be no dispute that from the strict procedural viewpoint, the United Nations has not erred when the subject of China's representation came up for discussion both in the Security Council and in the General Assembly. As the issue was first discussed by the former, the sequence of events may be briefly described as follows.

Procedure in the Security Council

It was in 1950 that the Soviet Union, for the first time, moved a motion to unseat the Nationalist China representative. Although the motion was lost, as it could not get the seven affirmative votes required under Article 27 (2) of the Charter,[1] the procedure

[1] See 459th Meeting, January 10, 1950, United Nations Documents S/PV., 459. For further proceedings see Kelsen, *Recent trends in the Law of United Nations* (1951), pp. 940 *et seq.*; Briggs, " Chinese Representation in the United Nations," *International Organisation*, Vol. 6 (1952), pp. 192 *et seq*; Fitzmaurice " Chinese Representation in the United Nations," *Year Book of World Affairs*, Vol. 6, 1952, pp. 36 *et seq.* See also *Repertory of Practice of United Nations Organs*, 1955, Article 9 of the Charter, p. 249.

which was followed clarified two basic points. First, the Security Council rightly treated the question of unseating the Nationalist representative of Nationalist China and seating the Communist representative as a matter of procedure and not of substance. The question of admitting a representative of a member-State has two aspects. First, whether the credentials are in proper form and have actually been issued by the authority mentioned, which is a question of form, and, secondly, whether the authority that has issued the credentials has the necessary status and the right to act on behalf of the member-State concerned, which is a question of substance. The Security Council rightly treated both these questions as matters of procedure, because to treat the latter aspect as one of substance would have involved not only a vote of seven members but also the concurring votes of the permanent members before a decision could be taken. As the basic idea is to enable a member-State to be effectively represented with ease, the decision to treat the entire matter as one of procedure was a welcome step in the right direction. Thus, in this particular case, the question of veto did not arise in spite of the fact that the Chinese representative voted against the motion, which was lost in any case, because it did not receive the necessary seven affirmative votes.[2]

Secondly, the procedure followed in permitting a representative of a member-State whose original admission was valid to continue to participate was correct, because until that representative was unseated by a regular vote of the appropriate organ of the institution, or dropped out, it would not have been legally permissible to accept a new representative of the same member-State. In this connection it may be stated that there is a presumption in favour of continued representation by the established Government for so long as the new Government has not been fully installed in effective power. To illustrate this, it may be mentioned that during the Spanish Civil War of 1936–1939, the lawful Government of Spain, though deprived of the major part of its national territory, was allowed to continue to represent Spain in

[2] At the 482nd Meeting the Soviet Delegate, acting as President, refused at first to count the vote of the delegate of China. Later the President changed his view by announcing that eight votes were cast against the President's ruling " including the vote of the representative of the Kuomintang." See United Nations Documents S/PV., 480 Rev. 1, pp. 9 and 10.

the Council and the Assembly of the League of Nations. However, once the Government of General Franco was fully installed and assumed effective control of the Spanish territories, that state of affairs was promptly ended [3] and the representatives of the defeated Government were unseated. But it must be emphasised that this presumption in international law should not be rigidly interpreted. It has to be construed in the context of facts as established. It is significant that in 1875 Lord Derby stated in the House of Lords, while recognising the Spanish Serraño Government, that to maintain "that the lawful Government holding out in an isolated fortress is entitled to continued recognition *de jure* is to strain to a breaking point an otherwise unimpeachable rule." [3a] Judge Lauterpacht has also rightly remarked that the "sharp knife of policy" has to prevent the rule from being reduced to an absurdity.[4] However, in the case of China, legal presumption has brought things to what many consider a ludicrous state by permitting the Chinese Government in Formosa to take a permanent seat in the Security Council of the United Nations. The need to sharpen the knife of policy in this case is very great.

Procedure followed in the General Assembly

It was in the autumn of 1950 that the matter first came up before the General Assembly when the credentials of the Chinese representative were challenged as a result of a Soviet motion. Although the credentials were upheld by the Assembly as a whole, which thereby permitted the Nationalist Chinese representatives to continue to participate in the United Nations, the entire matter was referred by a resoluion [No. 490 (v) of September 19, 1950] to a Special Committee, the members of which were nominees of the President of the General Assembly. This was also a correct procedural step, because it was impossible for a parent organ like the General Assembly to examine the legal issues involved in the

[3] After the conclusion of the struggle, Franco Spain withdrew from the League. See *League of Nations Official Journal*, Vol. 20, 1939, p. 344. See also, *ibid.*, Vols. 18, 19 and 20 under Index titles "Spain" and "Civil War in Spain," and *Official Journal* Special Supplement, No. 183 (19th session of the Assembly), pp. 31–32, and Walters, *History of the League of Nations*, Vol. 2 (1952), pp. 124 and 790.

[3a] See H.L. Debates, Vol. CCXII, col. 1382.

[4] Lauterpacht, *Recognition in International Law* (1948), p. 97.

case and it was, therefore, only proper to have the entire question gone into by a Special Committee. It is unfortunate, however, that this Special Committee,[5] could not come to any conclusion. It rejected, by five votes to two, a Polish proposal to recommend to the Assembly the exclusion of the representatives of the Nationalist Government of China and to invite representatives of the Central People's Government of the People's Republic of China. Hence, by five votes to one, the Special Committee authorised its Chairman to inform the Assembly that it was not in a position to make any recommendation on the question of the representation of China.[6]

At the Fifth Session of the General Assembly (332nd meeting of November 5, 1951), the President proposed that the Assembly should take note of the Special Committee's report and end the question. Although the Soviet Union made a counter-proposal that the question of representation of China should be referred to the Assembly's next session, this was rejected by 20 votes to 11. The President's proposal shelving the question was adopted by 36 votes to 5.[7] Ever since then the Soviet Union has been pressing for the consideration of this question by the Assembly at its various sessions, but to no effect. It could not be considered at the Sixth Session because the Assembly's General Committee recommended postponement, and all efforts to revive the question failed.[8] Again, at the General Assembly's Seventh Session, the Soviet representative submitted to the Credentials Committee a draft Resolution on October 17, 1952, recommending that the Assembly should invalidate the credentials of the representatives of the Kuomintang Government, since their credentials did not satisfy the requirements of Rule 27 of the Assembly's Rules of Procedure.[9] The United States submitted a counter-resolution recommending postponement of the consideration of this case during the Seventh Session. This was carried, and the

[5] See Documents A/AC. 38/SR 18–24, 57–60 October 20, 21, 23, 25 and 26 and November 27 and 28, 1950, pp. 111–160, 363–390.
[6] A/1923. See also A/1578: A/AC. 38/SR 57–60 and Resolution 396(V) 325th Plenary Meeting.
[7] Resolution 501(V).
[8] 342nd Plenary Meeting and 361st Plenary Meeting of the General Assembly, *Official Records*, 1951–1952 at pp. 104–211.
[9] A/CR/L2.

Assembly has not been in a position to examine it on merits any further.[10]

Thus it would appear that the Chinese representation could not be considered by the organs of the UN because it failed to get the necessary simple majority for its examination. The procedure followed was correct throughout, although the stalemate reached, which in legal effect amounted to at least suspension if not termination of membership of China as such, is both legally unwarranted, and, from the viewpoint of the Organisation, undesirable. Before we examine the legal merits of the General Assembly's decision to defer consideration of the question of Chinese representation, it is necessary briefly to mention the various proposals which emanated from the Secretary-General and Members of the United Nations to tackle this complicated problem and to set up a definite procedure for the future.

The Secretary-General's proposals

The Secretary-General circulated a memorandum in 1950[11] in which he suggested the formula that the Government seeking to represent a member-State must be :—(i) able and willing to carry out the State's obligations under the Treaty; and (ii) the question of representation of a member-State in the United Nations must be divorced from that of direct recognition of its Government by the member-States in the inter-governmental field.

Although the latter was a sound suggestion, separating the issue of recognition of the Government of a member-State by the Organisation from recognition by its members in their individual capacity, the former test relating to ability and willingness to carry out the obligations under the Charter could not be regarded

[10] The Report of the Credentials Committee was adopted by the Assembly Resolution 609 A(VII). For Eighth Session, see Assembly Resolution 800 (VIII) *U.N. Year Book*, 1953, p. 52. For Ninth Session, see Resolution 903 (IX).

" The General Assembly decides not to consider at its Ninth Regular Session during the coming year any proposal to exclude the Representative of the Government of the Republic of China or to seat Representative of the Central People's Government of the People's Republic of China." 473rd Plenary Meeting, Sep ember 21, 1954. Official Records, pp. 1–12. For 10th Plenary Session, see *The Times*, September 28, 1955.

[11] United Nations Document C/1466.

as making any contribution to the solution of the problem. It introduced a subjective test because " ability and willingness " could be differently interpreted by different States, as there could be no fixed yard-stick by which to measure these two qualities of the Government of a member-State. Incidentally, the introduction of these two qualitative tests for continuance of membership of a State, which according to the United Nations Charter are tests of membership only, complicated the problem rather than solved it.

The Cuban proposal [12]

The Cuban proposal was no better because it failed to introduce a purely objective test which is necessary to decide all questions of representation of member-States. The following criteria for testing the *de facto* nature of the Government of a member-State were embodied in the Cuban proposal:—(a) effective authority over the national territory; (b) the general consent of the population; (c) ability and willingness to achieve the purposes of the international obligations of the State; and (d) respect for human rights and fundamental freedoms. As it was essential to fulfil all four conditions mentioned above and failure in respect of even one of them would produce an answer in the negative, it was quite obvious that member-States of an organisation would come to different conclusions on points such as respect for human rights and fundamental freedoms apart from the " ability and willingness " test which also found a place in the Cuban criteria. Another defect in the Cuban proposal was to suggest a difficult procedure by empowering the Assembly alone as the appropriate organ of the United Nations to decide all questions of representation. The Specialised Agencies were to adopt the conclusions reached by the Assembly. As the General Assembly meets at regular intervals and as the various Specialised Agencies with their vast membership meet frequently, such a procedure would only have paralysed action on an issue which demanded promptness in order to keep the Specialised Agencies functioning.

[12] General Assembly Doc. A/1308.

The United Kingdom counter-proposal [13]

The United Kingdom Government circulated a counter-proposal to the Cuban one indicating a distinctly more objective test on which general agreement could be more easily reached. It prescribed three criteria for recognising the right to representation of any Government of a member-State, namely (i) effective control of most of the national territory; (ii) "reasonable expectancy of permanence"; and (iii) support of "the will of the nation substantially declared" and, hence, the exercise of power of that Government with the apparent acquiescence of the population.[14] These are the basic factual tests prescribed by jurists in various text-books on international law when dealing with the subject of recognition of States and Governments. If it had been possible to apply these tests dispassionately, irrespective of all considerations relating to the political complexion of the new State or its Government, a uniformity of decision would certainly have been reached. However, in the Assembly, opinion was divided on the United Kingdom Proposal as much as on the Cuban one. There were delegates who thought that the matter was one of pure policy left for each Government to decide in relation to each case as it arose.[15] In short, they were not in a mood to fix any general criteria on an agreed basis. The Assembly, therefore, left the question to be determined in accordance with the principles of the Charter in the light of the circumstances of each case. In this particular case of China's representation, it may be summed up that on considerations of policy, rather than law and fact, members of the United Nations have not been able to permit the representatives of the Central People's Government of the People's Republic of China to take their due place in the Organisation. This is a legally untenable decision which has confused expert international opinion on the subject, and led to somewhat absurd conclusions being reached which become apparent when the law on the subject is examined.

[13] General Assembly Documents A/AC38/L21, October 20, 1950 and *ibid.*, Rev. 1 October 31, 1950.

[14] Fenwick in A.J.I.L. 47 (1953), pp. 659–661, takes the view that the Communist Government of China does not fulfil "the objective test of stability" because it is "based upon the principle of one party system, denying to its people the freedom of expression which is the only means by which the will of the people can be ascertained."

[15] 325th Plenary Session General Assembly Resolution 396(V) A.P.V., 325, December 14, 1950, p. 675.

Law

International law is a law between States and not between Governments. Again, it is fundamental that States, not Governments, are members of the United Nations or of any other international organisation. The Government of a member-State is only its effective mouthpiece and no more. Thus the parties to treaty obligations are States and not their Governments. This is the position irrespective of whether a treaty is an inter-State one or even an inter-governmental one. Thus when an obligation is expressed as between Governments, the latter contract as agents and bind the respective States. China, by her ratification of the Charter, has obtained certain rights and accepted certain obligations on the same basis of any other member-State of the United Nations. To deny, therefore, the effective mouthpiece of China, which is today the Government of Mao Tse-tung, its rights and obligations is to commit an international wrong in relation to China as a State. It must be emphasised that the only change that has taken place in China which may be said to "justify" such a treatment is the change in the nature of the Government. Its effect on treaty obligations should, therefore, be examined first. The international law on the subject is quite clear. If a change takes place in the form of Government it does not absolve a State of its treaty obligations. Thus Oppenheim has very significantly pointed out that "even when a monarchy turns into a republic, or *vice versa*, treaty obligations regularly remain the same." [16] These changes may be important, but they "do not alter the person of the State which concluded the treaty." For example, the Labour Conventions ratified by the Government of British India still bind India even after Independence. The controversy on this subject, it was hoped, had been settled once for all in the United States as a result of the classic debate which took place in 1793 when President Washington submitted to his Cabinet the question whether the United States were obliged to consider the treaties previously made with pre-Revolutionary France as in full force. Hamilton argued that the United States had an option to consider the treaties as provisionally suspended having even the right to renounce them, "if such changes should take place as could bona fide be pronounced to make a continuance

[16] Oppenheim, *op. cit.*, Vol. 1, p. 925.

of the connections which resulted from them disadvantageous and dangerous." [17] However, this contention was considered at great length and over-ruled by Jefferson and Madison, who were of the definite opinion that the internal changes in France did not affect the binding force of the treaties. Hamilton's argument that a change in Government was in itself a change in the essential conditions of the Franco-American Treaties could not be admitted by any principle or maxim of international law. The doctrine *rebus sic stantibus* which permits a vital change in circumstance to dissolve a solemn treaty cannot be invoked in the case of Communist China, because membership of the United Nations is already open to the Communist State of the Soviet Union, if Communism is the only objection to China's representation. However, if " the new and revolutionary Government " in China is the basis of objection, the acceptance and continuance by the United Nations of several other countries which have undergone at one time or another revolutionary changes establishing new Governments would serve to indicate that China cannot be isolated for discriminatory treatment. If the United Nations Organisation had been inspired by a single idea like the Holy Alliance of the past or the NATO of modern times, the change in Government to the extent of installing a diametrically opposite type would invoke the doctrine of *rebus sic stantibus* and discharge a member-State of its treaty obligations. But as the United Nations is not inspired by any single idea or motive and is universal in its membership including Communist Governments as well as other types of new and revolutionary ones, the exclusion of China by refusing its effective mouthpiece the right of representation is a clear illegality involving :—(i) disregard of international law and the commission of an international wrong; (ii) violation of the United Nations Charter; (iii) adoption of an unconstitutional procedure; (iv) conclusions being reached which are impossible to sustain; (v) resort to discriminatory treatment which is forbidden according to international standards; (vi) loss of potency and effectiveness of the United Nations from the organisational viewpoint; and (vii) a complete confusion of the principles of recognition as accepted by international law.

[17] Moore, *International Law Digest*, V, p. 336.

A breach of international law

It has already been indicated that a mere change in Government cannot absolve a State of its treaty obligations. If the change is brought about by revolutionary means, Lord McNair [18] has clearly pointed out that in United Kingdom practice for the period of the interval between the fall of one duly recognised Government and the recognition of the new and revolutionary one treaties become suspended. However, they are, in law, to be regarded as in force. Furthermore, upon recognition, their operation automatically revives in the absence of any agreement to the contrary. The temporary suspension takes place only when there are two candidate Governments in existence, which creates the practical difficulty of selecting one as responsible for the discharge of treaty obligations. This practical necessity dictates that until such times as one effective Government has emerged successfully, treaty obligations may be suspended. Thus, as the Central People's Government of the People's Republic of China came to be established gradually and at one time there were two authorities functioning in China, the treaty obligations may at most have been temporarily suspended and China's membership of the United Nations held in abeyance until such period as the Communist Government was firmly established as the sole Government of China. However, having once been installed as the effective Government of the entire Chinese mainland, to deny that Government its existence is to deny in legal effect the geographical existence of the whole of China, with its one-sixth of the human race and its treaty right to membership and consequent representation in the United Nations. Such an act, which is contrary to both international law and practice, is certainly an international wrong. According to Judge Lauterpacht, to deny a State its right to be represented when it has an effective Government in position is " to question its independence." " For this reason States are not normally concerned with the changes in the composition or in the form of Government which occur in other countries; the international personality of the State is not affected by transformations of that kind. This applies to changes taking place both in conformity with and in violation of the

[18] *The Law of Treaties*, p. 384.

constitutional law of the State in question."[19] It is also significant that writers of authority like Fauchille,[20] Anzilotti[21] and Cavaglieri,[22] who have denied that there is ever a legal duty to recognise a State, have affirmed the existence of an obligation in the matter of recognition of governments.

Although Judge Lauterpacht has held the view that there is a right to recognition and a duty to recognise, there are others who have doubted the soundness of this assertion. It is submitted that whatever may be the international practice in the field of inter-governmental recognition, where there may be neither a right nor a duty to recognise, it is quite clear that in the sphere of international organisations, where the question is limited to one of representation of a member-State, the organisation is distinctly under a treaty obligation to accept any effective representative of that member-State irrespective of its political creed. Having once admitted a State as a member, the organisation cannot subsequently question the colour of the Government of that member-State and hold that to be the ground for a *de facto* termination of its membership, unless a specific provision exists in the treaty to that effect, or unless the plea of *rebus sic stantibus* would justify dissolution of the treaty in the very exceptional case quoted before. Thus, as long as the representative is an effective one, the United Nations is under an obligation arising from its Charter to respect the nominee of any effective Government of China, which is a member-State. Although individual States *inter se* may apply any number of objective or subjective tests for recognising new Governments, and may even withhold recognition for a number of years, on the basis of their likes and dislikes, an international organisation has no *locus standi* to do so. This must be the logical conclusion for the simple reason that " so far as international law is concerned, the legality or otherwise of the revolution is a matter of indifference. If revolution were an unlawful act in international law, it would produce no results valid in the international sphere; its factual success could not prevail against the unlawfulness of its origin. But international law does not prohibit revolution as a means of constitutional or

[19] *Recognition in International Law*, 1948, p. 87.
[20] Fauchille, *Traité de droit international public*, Vol. I (Part I) (1922), p. 321.
[21] Anzilotti, *Cours de droit international* (trans. by Gidel, 1929), p. 179.
[22] Cavaglieri, *Corso di diritto internazionale, Parte Generale* (1925), p. 187.

purely governmental change within the State. From the point of view of foreign States and of international law generally, there is, in principle, no difference between a constitutional and a revolutionary change of Government." [23] This fundamental principle goes back to Grotius, who said "*Neque refert quomodo gubernetur, regione, an plurium, an multitudinis imperio. Idem enim est populus Romanus sub regibus, consulibus, imperatoribus.*" [24] Thus it is international law which prevents the chain of legal continuity from snapping and lays down that a State and its obligations remain the same, irrespective of consitutional or governmental changes which may be revolutionary or otherwise.

A refusal on the part of the Organisation to accept an effective representative of a member-State is to commit a breach of a treaty and that, too, unilaterally. It is emphasised that the same cannot be said of a sovereign independent State like the United States refusing to recognise the Government of another sovereign State like China, because there is no treaty which binds or compels one or the other to admit the recognition of the Government of the other, as is necessary in the case of a constituent instrument which establishes an international organisation. The basic legal distinction lies in the fact that, while in the inter-governmental field of recognition, the new government of a State if established by revolutionary means becomes a candidate seeking recognition, it is submitted that in the case of international organisations the same revolutionary Government, if left without a rival, is not a candidate, inasmuch as if its State is already a member by treaty right it has the capacity *ipso facto* to exercise the right of membership. This distinction must be acknowledged because international organisations have to register as many acceptances as possible of enforceable decisions taken by the member-States so that they may be bound by them. If a State is not represented or it is represented by someone who has nothing to do with that State, as is the position with the Kuomintang representing China, the organisation would not be able to function effectively. The decisions taken by the organisation would not be enforceable in relation to the State unrepresented or misrepresented. The interests of international organisations can thus be best served

[23] Lauterpacht, *op. cit.*, p. 92.
[24] Grotius, Book II, Chap. IX, VIII.

by accepting any representative of a Government if effectively functioning as a Government of that State in its national territories. There may be a legal objection to premature recognition as it involves an international tort, but that is only when there are two competing candidate Governments seeking recognition. If that is not so, there can be no question of any risk in recognising a State or Government even if it may not survive for a particular length of time. Thus international organisations must be prepared to accept Governments which are effectively installed in power in the national territories, irrespective of whether they are there by revolutionary or constitutional means or whether they are likely to be permanent or in power for a short period only. Thus, as the Communist Government has fully and effectively established itself on the mainland of China, it must be given the right of representation as against the defeated Government holding out in an island having no control over or connection with the national territories on the mainland of China. As the Prime Minister of India has very aptly remarked, "Not to recognise facts was a dangerous thing. To regard Formosa as representing China was as sensible as it was to regard the Andamans as representing the 360 million people of India. But in Geneva facts had ultimately been recognised." [25]

Violation of the Charter

Again, to deny representation to a State which has in existence its effectively established Government of any kind that it chooses, just because on moral grounds it may neither have the ability nor the willingness to comply with the obligations of the organisation, is, in legal effect, to suspend or expel a member-State not only *ex parte* and without a hearing but also without its having violated, as a fully represented member, any of the principles of the constitution of the organisation. In short, in the case of the United Nations and China, it means invoking the provisions of Article 6 of the Charter, contrary to the entire intent and purpose of that Article, because China, by a mere change of its Government, cannot, by any stretch of imagination, be regarded as having violated the principles of the Charter. On the other hand, to hold that the Central People's Government of the People's

[25] *Statesman*, New Delhi, dated July 27, 1954.

Republic of China by its invasion of Korea has violated the Charter and hence is disqualified for membership is to adopt an unconstitutional procedure. For such an act, if maintained to be true, the correct legal action would be expulsion of the entire State of China from its membership and not this ineffective step of preventing its legal and effective representatives from participating in the United Nations without warrant in the Charter. Thus, the members of the General Assembly and Security Council, in refusing to take a decision to unseat the Nationalist representatives with a view to making room for the Communist representatives, have deprived China of her legitimate membership of the United Nations in contravention of the provisions of the Charter and failed to take the constitutionally appropriate action of expulsion if there was a clear case of violation of the Charter. If Article 6 cannot be legally invoked for the purpose of the termination of the representation of a Government which in law does not exist, the question can be asked under what stipulation of the Charter has China lost her membership? [26]

In this connection, however, it is necessary to deal more fully with the contention that as China is neither able nor willing to carry out her obligations, it would be wrong to continue her membership. In the first instance, it may be pointed out that these tests of ability and willingness are prescribed for admission of new members under Article 4 of the Charter and they can, in no circumstances, be applied as tests for continuance of membership. For example, the United Kingdom, being a member, and continuing to be one, cannot be called upon to show proof of her ability and willingness to carry out the obligations of the Charter at each and every change of Government. Again, as already stated, from the strict constitutional viewpoint of international organisations, the colour of the Government of a State and how it came to power are internal questions of the State concerned [27]

[26] Article 6 of the United Nations Charter reads as follows:—"A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organisation by the General Assembly upon the recommendation of the Security Council."

[27] See Lauterpacht, *Recognition in International Law*, 1948, p. 91: "It is of the essence of the notion of independence of States that changes in the structure or in the composition of their Governments are, in international law as at present constituted, an internal question of the States concerned and that foreign States are not, in general, entitled to interfere in the matter by raising the question of recognition or by refusing to grant it."

and the organisation having accepted a State as a member cannot constitute itself into a fact-finding Commission to examine *de novo* whether to deny or accept the Government of that member-State whenever a change takes place. Apart from the practical impossibility of it all, there is no legal justification as no right or duty has ever been conferred by any constituent instrument on any international organisation to do so. It would be wholly illegal for an organisation to resort to such methods which would be *ultra vires* its powers since the member-States, as signatories, could never have contemplated such a step. To permit an international organisation to perform the function of a fact-finding Commission which would verge on intervention in the domestic affairs of member-States is to violate the well-established maxim of international law *par in parem non habet imperium*, which is based upon the principles of independence, equality and dignity of States. Thus, the change of Government in China cannot be taken as a legal event justifying the necessity of fresh proof of ability and willingness to carry out her obligations. If States with Communist Governments are members of the United Nations and considered competent and willing to carry out the obligations of the Charter, there is every reason for China to do likewise. To invoke in this particular case the provisions of Article 4 as a test of continuity of membership, when that Article applies to admission of new members, is as unconstitutional as it would be to invoke Article 6 to frustrate China's representation in the United Nations. It is submitted that neither Article 4 nor Article 6 can be invoked and the correct constitutional procedure should have been to permit representatives of the Central People's Government of the People's Republic of China to take their due place and position in the United Nations, and if afterwards it was found that China had violated any of the provisions of the Charter, to resort to the constitutional procedure for expulsion or enforcement action under the provisions of the Charter.[28] It was at least necessary to give Communist China a chance to prove its ability

[28] Article 4 of the United Nations Charter reads as follows: "1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations. 2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council."

and willingness by allowing it to sit as a member even on a trial basis before condemning it *ex parte*, particularly when the Communist Governments of other member-States are allowed to continue in the United Nations. However, at the present moment, an *ex parte* decision of such a nature has been taken that the people of China may have a legitimate complaint that, for no fault of theirs, they have been deprived of their right of membership of a world organisation. There can be no doubt that not only an unconstitutional procedure has been followed, but that the Charter itself has been violated and abused to the extent that the right to represent China has been given to a Government which has been installed in Formosa. Thus there has been a clear divorce of the State of China as a member from the Government which has been called to represent it. Such a divorce from reality has led to serious complications which are described below.

Absurd Result

The result of this initial error has been to lead the international community into an absurd position : the more so because another Government which is totally devoid of any control and power over the mainland of China has been recognised to speak for it. Thus, for example, if the Kuomintang Government in Formosa enters into a treaty as the "Government of China," it would most definitely be repudiated by the effectively established Central People's Government of the mainland of China. In actual effect, no State would be bound by such a treaty. This is merely a hypothetical illustration, but there are actual instances of this confusion resulting from the notice of termination given by the Nationalist Chinese Government to some of the ICAO Conventions [29] and the GATT.[30] The important legal question would be whether China continued a party to these treaties and Conventions or did the Nationalist Government in Formosa successfully terminate them. Such complications are bound to arise in regard to the membership of China in any of the Specialised Agencies of the United Nations like FAO and WHO, which confer benefits like the supply of food and medicines to the population

[29] Since readmitted. See Bulletin of ICAO, June–July, 1954, p. 6.
[30] On May 5, 1950. See *United Nations Year Book*, 1952, p. 913.

of the member-States. For example, is Formosa entitled to receive the entire quantity of medicines which would be intended for the peoples of China?

Again, what is much more relevant to the present context, is the resolution of February 1, 1951, of the General Assembly that it found that "the Central People's Government of the People's Republic of China has itself engaged in aggression in Korea."[31] If China is to be held responsible for this action in Korea it would be obvious that, according to the United States and all those who hold that the Kuomintang Government represents China, legal action for the act of aggression must be taken against that Government and not against the Communist Government of China.[32] The acts of the "unrecognised" Communist Government can only be the acts of the Chinese State if that Government is admitted as the representative Government of that State. No more absurd conclusion could be arrived at than this, which inevitably follows as a logical corollary of the refusal to recognise the existing Government of China which has effectively established itself.

Discrimination contrary to international standards

Again, as already pointed out, to penalise China for her new Communist Government established by a revolution while permitting other Governments installed in a similar way some decades ago to continue in the United Nations is, to say the least, discriminatory in the extreme. If the Governments of States coming to power by military *coups d'état* can continue to send their representatives to the United Nations, then to single out China is to mete out treatment to member-States which is contrary to international standards. In the *Norwegian Claims against the United States* (1922),[33] the Permanent Court of Arbitration had made a general observation that, all things being equal, discriminatory treatment of whatever nature was generally to be accepted as contrary to international law and standards. It is, therefore, strange that a global organisation of the type of the United Nations should practise discrimination in relation to its

[31] Resolution 498 (V).
[32] See Kelsen, *op. cit.*, p. 988.
[33] XVII, p. 151.

member-States when the same is not warranted by the Charter. If international organisations have to maintain international standards and respect the principle of equality of States in those spheres in which the same has not been challenged, it is of the very essence that a uniform principle should be followed.

Effectiveness of United Nations lost

It is hardly necessary to point out that the effectiveness of an organisation comes from its representative character. This applies much more to a global organisation like the United Nations than to any other type. To lose a Great Power like China, " which is one of the Big Five," would indeed be a serious loss to any organisation. It is well known that China has regarded her loss of membership of the United Nations as a national insult, and if it had been permitted to deliberate in the United Nations on the Korean issue, there are those who argue and feel that an agreed solution may possibly have been reached. The *raison d'être* of the United Nations is the maintenance of international peace and security and if this is in any way undermined by trifling with the concept of recognition, it is not only the organisation but the cause of world peace which suffers. Thus, on no account should the United Nations be allowed to undermine its effectiveness as a platform where every kind of international dispute can be settled. It is surely a grave political error, apart from being a legal disadvantage, for an organisation with such functions to perform, to deny millions their due representation arising out of treaty rights and to turn a deaf ear to China's continuous cry for membership of the United Nations Organisation.

The results of this omission can be clearly noticed in the annual report presented by the United Nations Secretary-General recently.[34] He has lamented the waning influence of the United Nations as matters of moment come up before a different forum of the Powers concerned, as at Berlin and Geneva lately. There is no doubt that basically the ultimate purpose served is the United Nations purpose, *i.e.*, of a peaceful settlement of all conflicts. However, the Secretary-General, Dr. Hammarskjöld, quite rightly points out that it is an inadvisable course which

[34] Annual Report of the Secretary-General, July 1, 1953 to June 30, 1954, Official Records, 9th Session, Supplement No. 1, (A

tends to reduce the influence and effectiveness of the United Nations. It cannot be disputed that this waning influence of the United Nations is the direct outcome of the termination of the membership of China, by continuing the representation of an authority which has no control whatever over the enormous population of that country. Thus, for example, the Korean armistice, though negotiated within the framework of the United Nations, could not successfully be concluded without the invitation to Communist China, as a vital Power concerned, to state her case. It is doubtful whether China could have been persuaded to attend again if the Indo-China war had been referred to the United Nations. Exclusion of China rankles and has not a little to do with matters being taken out of the hands of the United Nations, such as, for example, the working out of a truce in Indo-China. This inevitable recognition of Communist China in international conferences, but not as a member of the United Nations, emphasises beyond doubt that facts which have come to stay have to be recognised if anything is to be achieved, and it is doubtful if the United Nations can continue the farce any longer without considerable deterioration in the effectiveness of its functions as well as in its power and prestige.

Two types of recognition confused

Again, as already pointed out, recognition of a Government for purposes of acceptance or representation from a member-State is quite different from recognition given by one State to the Government of another State newly established. Thus, even if Communist representatives had been admitted to the United Nations on behalf of China, it would not have meant any tacit political or moral recognition of the Government of China by any of the member-States. Moreover, it would also not have implied the necessity of any kind of intercourse or diplomatic relations between China and other members of the United Nations. As there are, even now, cases where no diplomatic relations exist between certain States which are nevertheless members of the same international organisation, the conception of disapproval which some States wish to convey by refusing to recognise the Government of a particular State could still be conveyed in respect of their inter-State relationship, even though the organisation may

have accepted the representative of a Government of a member-State not yet recognised by some other members. In other words, for purposes of an international organisation, all the members may co-exist, although a particular member-State may refuse to recognise the Government of another member of the same organisation in the field of inter-State relations. There is no reason to confuse the issue of recognition of the Government of a member-State by an organisation with the recognition granted by a State in its normal diplomatic activity.

If international organisations are to function effectively and the territories and inhabitants of States which are members of such organisations are to benefit continuously from their membership, it is of the very essence that the Chinese precedent must be removed from the recent history of the international community. If a change in Government, which is a normal phenomenon of State-life, were to deprive a State of its permanent membership, stability in the realm of international organisations would fast disappear yielding place to uncertainty and doubt.

If, therefore, international organisations would confine themselves to recognising the fact of established Governments as the sole criterion governing the representation of member-States, they would adopt a sound rule both legally and politically. However, if they enter into the niceties of the political complexion of the Government of a member-State as affecting its ability or willingness to discharge international obligations, or if they sit in judgment to decide whether a Government came to power by normal constitutional means or by revolutionary devices, which is a matter of pure domestic concern, international organisations will soon lose their true representative character and shrink in membership, apart from being branded as guilty of discriminatory treatment and thus losing the faith of their members. Hence, the criterion of effectiveness is nowhere more applicable than to the problem of representation of member-States in international organisations. The test of effectiveness is, therefore, precise, definite and, in practical application, capable of yielding easily ascertainable results. Being consistent with basic facts, it is always nearer the truth on the point of representation than any other criterion. To import a consideration such as the true democratic character of a Government as a test of recognition,

which President Wilson prescribed to meet the constant governmental changes in Latin America,[35] would not only be in contravention of the Charter but would involve nothing short of an intervention to ascertain the real facts. If the Advisory Opinion of the International Court of Justice of 1948 on the admission question[36] is to be any guide to the problem under examination, it is submitted that it goes a long way to establish that no new conditions or powers can be read into the Charter over and above those which have been expressly stipulated. The Court decided by a majority of 9 to 6 that a member of the United Nations was not juridically entitled to make its consent to the admission of a new State dependent on conditions not expressly provided by paragraph (1) of Article 4 of the Charter. Thus, in the case of representation of member-States for which no provision exists in the United Nations Charter (since Article 4 lays down conditions of new member-States only), it would be reasonable to suppose that the Court could not extend the application of those conditions to test the representative character of the Governments of the member-States. It would thus be unwarranted to presume that the pronouncement of the International Court could even apply *mutatis mutandis* to the field of recognition of Governments also.[37] A State is bound to the extent of express consent only, and in the absence of a specific provision prescribing conditions of representation, conditions of this kind cannot be implied, for such a presumption would contravene the fundamental principle of international organisations that all residuary jurisdiction rests with the member-State and the organisation can only exercise those powers which are expressly conferred on it by its constitution. It should be emphasised again that for an organisation to undertake any inquiry in this connection would be *ultra vires* its powers, apart from being a violation of the maxim of international law which prohibits a State, let alone an international organisation, which is a mere creation of States, from assuming jurisdiction over other States tantamount to the exercise of *imperium* over them.

[35] Hackworth, *Digest*, Vol. 1, pp. 174–181.
[36] " Conditions of Admission of a State to Membership of the United Nations," Advisory Opinion, *I.C.J. Reports*, *1948*, pp. 57 *et seq.*
[37] See Prof. Alexandrowicz's article on " Quasi-Judicial Function in the Recognition of States and Governments " in A.J.I.L. (1952), p. 639.

Thus Judge Lauterpacht has rightly admitted that "among the various tests of recognition that the effectiveness—either in its literal meaning or as evidenced by adequately expressed popular approval—has become the predominant standard of recognition. A Government enjoying the obedience of the bulk of the population must be regarded as representing the State and, as such, to be entitled to recognition."[38] The test of effectiveness of government, which includes the element of stability, is based upon a fundamental concept, namely, the existence of a fact which no legal system, whether national or international, can afford to disregard. It is facts alone which furnish the guiding juridical principle for every kind of recognition. Although recognition alone may be constitutive of rights, it is submitted that if a State or a Government exists as a physical fact, it is only a matter of time before legal consequences will begin to flow from that fact. Judge Lauterpacht may be right when he has observed that "a physical fact is of no relevance for the commencement of particular international rights and duties until by recognition—and by nothing else—it has been lifted into the sphere of law, until by recognition it has become a juridical fact."[39] However, the essence of the matter is that legal recognition itself emanates from the existence of a fact and if that recognition has not the solid foundation of factual existence, the legal consequences may flow, but they must soon come to an end. Professor Alexandrowicz has, therefore, correctly pointed out that *de facto* situations irrespective of formal recognition cannot be ignored. Cognisance must be taken of basic facts either diplomatically or politically.[40] However, Brown, in the editorial comment on "cognition and recognition" appearing in the *American Journal of International Law*, differs from Professor Alexandrowicz's view that "it is impossible to recognise legally a State which does not exist *de facto*."[41] The learned editor has stated that when the United States and Great Britain recognised the non-existent State of Czechoslovakia in the First World War, there was no legal impediment to this extraordinary political act of recognition.[42] This

[38] *Recognition in International Law* (1948), p. 170.
[39] *Op. cit.*, p. 75.
[40] A.J.I.L., Vol. 46 (1952), pp. 631–640.
[41] *Ibid.*, Vol. 47 (1953), p. 87.
[42] *Ibid.*

may be true, but such ethereal recognition could never represent a lasting condition of things. The Central People's Government of China may not be recognised today, but the fundamental fact of its existence has already brought recognition from a part of the world and will compel recognition even in silent corners some day —probably not in the far distant future. Thus if the fact of existence cannot be ultimately denied, why not accept it sooner to avoid so much trouble and error? Czechoslovakia may have been given a legal status but it was pending the decision of the war. Thus recognition may be indispensable evidence without which the potential international rights are mere claims, but if these claims are founded on well-established facts, they can achieve recognition both in law and in international relations. Again, full, formal and effective recognition may be a sovereign political prerogative and not a judicial or a quasi-judicial function, but if its exercise is factually groundless, it could serve no useful purpose. Again, whatever may be the attitude of individual States in expressing disapproval by way of non-recognition from the viewpoint of international organisations, any approach divorced from reality can lead only to disaster. To avoid this dichotomy some international organisations of modern origin have made express stipulations in this regard. It is significant that the precedent in this direction should come from the Western hemisphere. In utter disregard of the constitutive theory and in clear and complete recognition of the principle of effectiveness as the exclusive determining factor of the political existence of a State or its Government, Article 9 of the Bogotá Charter of the Organisation of American States, 1951, provides that :—

> "The political existence of the State is independent of recognition by other States. Even before being recognised, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organise itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law."

If carefully considered, the problem of representation of Governments of member-States in international organisations is one of *de facto* recognition only, and does not involve the necessity of applying conditions required for *de jure* recognition. The terms *de facto* and *de jure* are used in the same sense as individual States use them in the field of recognition of Governments. Just as the internal acts of a *de facto* recognised Government have to be respected on account of the fact of physical existence, irrespective of other considerations, legal or political, similarly, the right to send a representative to an international organisation must be considered as an internal act falling within the competence of the Government of the State installed in effective power. The very institution of *de facto* recognition is proof of the acceptance of the principle of effectiveness in this sphere of international law. Thus it was laid down in *Luther* v. *Sagor*[43] that so far as the internal acts of the *de facto* recognised authority are concerned, full legal effect had to be given to them even though *de jure* recognition had not been granted. The confiscation of plywood under the National Decree of Soviet Russia was held legally valid even though the wood had found its way outside the Russian State. Similarly, in the case of the *Bank of Ethiopia* v. *National Bank of Egypt and Liguori*[44] it was held that as the British Government had recognised the Italian Government as being the *de facto* Government of the area of Abyssinia which had passed under the physical control of Italy, there was no option but to give effect to an Italian decree in Abyssinia which dissolved the Bank of Ethiopia. In the same way, it was held in *Banca de Bilbao* v. *Sancha Rey*[45] that the decrees of the *de jure* Spanish Government could not be accorded any legal validity in the territory in the physical control of the Nationalist Government recognised *de facto*. These are British decisions which clearly establish the importance of recognising the existence of physical conditions in the judicial field. It is essential that in the case of international organisations the same principle should also be followed. The examination of *de jure* recognition which involves moral and political approval may be left to the individual States to practise in the field of their political relationship *inter se*, although, for

[43] [1921] 3 K.B. 532.
[44] [1937] Ch. 513.
[45] [1938] 2 K.B. 176.

purposes of acceptance of representation from member-States in the sphere of international organisations, conditions justifying the grant of *de facto* recognition should suffice.

The only other point that remains to be discussed is whether effectiveness, pure and simple, should be the test, or effectiveness as evidenced by freely expressed popular approval. In other words, should it include Jefferson's phrase of 1793 " the will of the people substantially declared " which, according to Fenwick,[46] would exclude Governments established by " intimidation and terrorism " ? As Secretary Hughes pointed out in 1923, stability is essential, " but what avail is it if that stability is utilised in the prosecution of a policy of repudiation and confiscation ? " It is likely that individual States may take that view and condemn a Government before it has acted, but international organisations can only do so in accordance with their accepted constitutional procedure. In other words, it is incumbent upon organisations to admit the representative of that State and then to expel the State rather than its Government from the organisation according to the provisions of the constituent instrument. Expulsion is the proper and effective action to be taken against such a State if it acts inconsistently with the spirit of the principles of the charter of the organisation. However, to refuse to recognise its Government is to take a negative action which leads to complications besides being totally ineffective. For example, if enforcement action according to the Charter of the United Nations has to be taken against a State for the acts of its Government, the fact of the State's existence will have to be accepted : otherwise such enforcement action would be against something which in law does not exist. To remove such absurdities it is essential to follow the correct procedure of expulsion or enforcement action after admitting the Government of the member-State on the pure and simple test of its effectiveness alone.

Again, should the test of subsequent legitimation by popular consent be introduced into the concept of the test of effectiveness ? It is submitted that as a test should be free of all controversies, the element of legitimacy, if introduced, would mar rather than make for the efficacy of the test. Legitimacy of origin as a

[46] A.J.I.L., Vol. 47 (1953), p. 660.

criterion of recognition has been rejected long ago and even arbitral decisions have regarded it as having no place in international law. It was dismissed in the *Dreyfus* case and Chief Justice Taft of the Supreme Court of the United States denounced this test emphatically in the following words in the arbitration between Great Britain and Costa Rica in 1923[47]:

> "To hold that a Government which establishes itself and maintains a peaceful administration with the acquiescence of the people for a substantial period of time does not become a *de facto* Government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental laws of the existing Government cannot establish a new Government. This cannot be, and is not true. The issue is not whether the new Government assumes power or conducts its administration under the constitutional limitations established by the people during the incumbency of the Government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognise its control?"

As there are Governments in the world other than democratic, it would be difficult to apply the test of legitimacy of popular consent because there would be not only democratic legitimacy but also dictatorial legitimacy and monarchical legitimacy competing for recognition. In the circumstances, it is submitted that effectiveness, pure and simple, which means the installation of a Government without an effective rival in the national territories of the State, is the only acceptable criterion for international organisations to follow in the normal course. However, there are bound to be exceptions, as in the event of a war, when two competing candidate Governments come into existence and it is inevitable that the membership of that State should be in abeyance. But, as soon as one of the candidates emerges successfully, its representation should be acceptable.

It is of the very essence that considerations of past conduct and future behaviour are relevant to admission of a new State or to expulsion of a member-State from the organisation, or to

[47] *Tinoco Concessions*. See *Reports of International Arbitral Awards*, p. 369; *Annual Digest*, 1923–1924—Case No. 15: A.J.I.L., Vol. 18 (1924), pp. 147, 599.

enforcement action being taken against it in the light of illegalities committed. But neither of those factors could ever be relevant to acceptance of representation from the effectively established Government of a member-State. The distinction adverted to above must be maintained if law is to be observed and incongruity avoided. In this connection, a reference may also be made to Mr. Lodge's thirteen factors which he enumerated on May 26, 1954, when giving reasons why the United States considered "Communist China wholly unfit for membership of the United Nations."[48] Mr. Lodge's thirteen factors were as follows:

1. Aggression on three countries, direct in Korea, concealed in Indo-China and internal in China, where, Mr. Lodge said, about fifteen million people had been murdered since 1949. 2. Sacrificing China's interests to the Soviet Union. 3. Barbarous treatment of foreign nationals. 4. International promotion of drug peddling. 5. Persecution of religious and missionary organisations. 6. Abrogation of treaties and agreements linking China with the free world. 7. Propagation of "false evidence" in support of "spurious germ warfare charges" against the United States. 8. The "colonization" of North Korea. 9. Extortion of "confessions" from prisoners of war in Korea. 10. Conducting a campaign of terror and intimidation against South-East Asia. 11. Extorting "millions of dollars" from overseas Chinese to purchase safety and protection for their relatives at home. 12. Repeatedly launching false and hostile propaganda attacks on the United States. 13. Ignoring all recognised standards of international conduct and repeatedly violating the Korean armistice.

It is submitted that facts Nos. 2 and 11 come within the domestic jurisdiction of a member-State and cannot be regarded as legal arguments for debarring it from sending representatives to participate in international organisations as long as it continues to be a sovereign international person. In regard to fact No. 12, it would be a matter of concern between the States of China and the United States, and the latter may find reason to withhold recognition in the field of inter-State relations; but that could not apply to an international organisation which must accept facts as they exist. All the other facts enumerated by Mr. Lodge,

[48] See the daily *Hindustan Times* published at New Delhi, dated May 27, 1954.

if proved to be true, would justify either the refusal to admit a new member or the expulsion of an existing member or the taking of enforcement action against it, which would be the appropriate step by way of punishment that could be taken by the organisation against any member-State which is alleged to be continuously in breach of international law and disregarding international obligations. However, to refuse a regular member of an international organisation its right of representation is taking no punitive action at all but merely side-tracking the issue. It is certainly not adopting the appropriate constitutional measures because the member-State alleged to have defaulted is not brought to book. On the other hand, instead of punishing it, an international wrong is committed against it as a result of accepting the representation of an authority which has ceased to have any connection with the territories of the defaulting member-State.

In the foregoing pages an attempt has been made to suggest a solution to this difficult problem of international law and politics. While opinions may differ on the possible solutions to this international enigma, it is most essential for the healthy growth and development of international organisations that this case should not stand as a precedent for an erroneous approach to the question of representation in the United Nations.

Chapter 10

CONCLUSIONS

As the provisions for termination in a constituent instrument are of fundamental importance to the stability and permanence of an international organisation, it is essential to study what it is necessary to state in the treaty and what can be omitted to achieve the desired result. There are certain considerations which are basic to all international organisations and they may be stated first.

Matters of Fundamental Importance

(1) Withdrawal Clause

The first basic point is the necessity for the insertion of a withdrawal clause in a constituent instrument. It is for the participating States concerned to indicate whether withdrawal is to be completely barred or to be permitted under certain conditions—such as after an "initial prohibitory period," followed by a "cooling-off period" and after financial obligations as well as other outstanding obligations have been met. If the intention is to discourage withdrawal as far as possible, the first principle to be observed by the draftsman who is faced with the task of implementing that intention is that withdrawal cannot be prevented by silence. In this connection, the case of the United Nations has been instanced. In the absence of a specific provision relating to withdrawal, the door is left open to the member-State to make its exit from the organisation without giving any reasons for so doing and even without prior compliance with its financial and other obligations. One must constantly bear in mind that the sovereign member-State is bound only to the extent to which it has expressly committed itself, and anything not stipulated in the constituent instrument falls within the residuary jurisdiction of the member-State; the principle is fundamental and any misconception of its effect on international organisations is certain to give rise to serious error. However, as withdrawal cannot be completely barred without adversely affecting the universality

of the organisation, the following practical devices must always be considered when the problem arises of drafting a constituent instrument of a permanent type of a global international organisation which intends to discourage withdrawal.

(a) A stipulation of an initial prohibitory period of at least fifty years [1] would be most helpful to put the organisation on a sound footing. In such an event, the prestige of the organisation would increase with time and the chances are that after fifty years, despite the permissibility of withdrawal, there would be no exits in actual fact. The advantages of the initial prohibitory period have already been explained at length in Chapter 2 and need not be repeated here.

(b) A " cooling-off period " of, say, three years, in addition to the initial prohibitory period, would also be most helpful to check withdrawal, as it will give plenty of time for the withdrawing member to reconsider its decision and for the people of that State fully to appreciate the implications of withdrawal. If a long enough " cooling-off period " is stipulated, say of two to three years, even a change of Government may intervene, in the normal constitutional process, which may affect the contemplated withdrawal of the member-State.

(c) It is much better to combine these devices with a recital of the fact that the treaty is perpetual so as to indicate the intention of permanence. The principle of the Bogotá Charter which permits withdrawal but nevertheless makes the duration of the treaty indefinite is worth following.[2]

(d) If it has been accepted that withdrawal should be properly hedged in and conditioned so as to make it as difficult as possible, there should always be included in the withdrawal clause the appropriate financial safeguard, namely, that withdrawal shall not be effective unless outstanding financial obligations have been met. It has already been explained at length in Chapter 2 that this financial provision in the normal withdrawal clause is an independent requirement and is not rendered superfluous by the financial stipulation in the suspension clause. From a purely administrative standpoint, a financial provision in the withdrawal

[1] On the analogy of the European Coal and Steel Community (Article 97).
[2] Article 112 of Bogotá Charter and Article X of *Anzus* treaty embody this salutary principle.

clause as well as in the suspension clause is necessary to safeguard the financial interests of the organisation, both when a member wishes to withdraw or when it falls into arrears and has to be reminded of its financial obligations. A withdrawal clause without the appropriate financial stipulation suffers from a serious lacuna [3] which is more difficult to excuse when a withdrawal clause has in fact been inserted in the constituent instrument. On the whole, if an international organisation is to be armed effectively to safeguard its financial interest, it must have the financial provision in both the withdrawal as well as the suspension clauses. Having a stipulation in one alone is certainly not adequate.

(e) Although the Covenant of the League [4] mentions the need to meet international obligations as well as obligations under the Covenant before withdrawal becomes effective, it is submitted that such a stipulation may not be necessary. It raises a paradox, because for a violation of the principles of the Organisation expulsion is provided and yet for those very violations a member is incapacitated from withdrawing. However, it could probably be argued that expulsion is provided for violation of the more fundamental provisions of the Organisation or for the persistent defaulter who refuses to leave the Organisation, whereas the clause relating to outstanding obligations being met relates to financial and other minor provisions of the Organisation. As it is extremely difficult to distinguish between the more fundamental and the less important provisions of a constituent instrument, it would be more appropriate to avoid a stipulation of the type found in Article 1 (3) of the Covenant of the League. However, if it is found necessary to insert those conditions, it is most essential to specify the various organs of the international body which would be empowered to judge whether international obligations or obligations under the constituent instrument have been violated in such a manner as to justify prevention of withdrawal. This was a serious lacuna in the Covenant of the League as a result of which Germany, Japan and Paraguay were able to withdraw without being branded as defaulters incapable of withdrawing on account of their violation of the obligations under the Covenant.

[3] The ITU (Article 20) and UPU (Article 10) have withdrawal clauses but without the financial safeguard. Similarly, Article 4 (10) of IRO provided for withdrawal but without the financial stipulation.

[4] Article 1 (3).

(2) Expulsion Clause

(a) Again, the very necessity of an expulsion clause in a constituent instrument has to be examined. Expulsion as a sanction is an ineffective remedy because both the Covenant of the League and the UN Charter provide a much more effective type of action against a peace-breaking State, such as sanctions under Article 16 of the Covenant and enforcement action under Chapter VI of the United Nations Charter. Thus expulsion is necessary only as a precautionary clause to protect the Organisation against the obstructionism [5] of the defaulting State which may persist in its membership even after violating the Charter. However, suspension can equally effectively serve this purpose. In certain cases expulsion could be utilised as a sanction by virtue of the fact that it carries with it the threat of outlawry. But as the exit of a member-State is an easy means of escaping the obligations of membership of an organisation, expulsion is no effective punishment for violation of the constitution unless the advantages of membership are overriding. Its utility is, therefore, doubtful, depending on the nature and functions of the organisation, which alone can determine the necessity for incorporating an expulsion clause in a constituent instrument.

(b) Again, if expulsion is to be introduced in a constituent instrument, it is necessary to define the exact scope and extent of the conditions necessary for the exercise of that power. The usual formula if persistent violation of the principles of the organisation is too vague, because it may be difficult to define with any precision the " principles of the organisation." It would be much better to specify certain provisions of the constituent instrument which are regarded as fundamental, the violation of which would justify expulsion. In this respect the provision of Article 8 of the Statute of the Council of Europe is worth following.

(3) Suspension Clause

Suspension merely places in temporary abeyance the privileges of membership without freeing that State from its obligations to the organisation. Suspension is, therefore, an essential feature of international organisations. Modern international constituent

[5] See Article 5 of the United Nations Charter which prescribes suspension from the exercise of the rights and privileges of membership of a State against which preventive or enforcement action has been taken.

instruments have more often than not a suspension clause on account of the financial safeguard it provides, rather than as a sanction for the violation of the non-financial provisions of the organisation. There are international organisations which stipulate suspension for any kind of default, whether of financial provisions or of the less important non-financial provisions, since a more serious default would call for a more drastic action under expulsion and may even justify enforcement action. Although in the Covenant of the League the suspension clause was conspicuous by its absence, later organisations have regarded it as a fundamental requirement which in certain ways is more appropriate and effective than expulsion. It might even be said that the suspension clause alone would be quite adequate as expulsion provides no real remedy to the problem of international organisations.

Matters of General Interest

(i) In regard to suspension as well as expulsion, it is advisable to employ permissive rather than mandatory clauses. The organs of the international body empowered to suspend or expel must be clearly stated, but the exercise of the right must be left completely discretionary.

(ii) The power to suspend or expel must always be vested in the parent organ of the international body. If another organ like the Security Council is endowed with greater powers and must, therefore, have a say in the matter, the United Nations formula vesting it with power to recommend and the parent organ of the Assembly with the final power to confirm would be the ideal device in any constituent instrument.

(iii) The defaulting member-State concerned must always be given an opportunity to explain its conduct before being suspended or expelled. Although constituent instruments do not usually provide for any notice to be given to the defaulting State, it is submitted that in respect of financial provisions, a reasonable notice period would be most desirable. Thus, for financial defaults, suspension of voting rights *ipso facto* after the expiry of a reasonable period of notice would be justified. In regard to defaults, other than financial, a decision by a two-thirds majority of the main representative organ of the body, after giving the

defaulting member-State an opportunity to explain its conduct, is the most satisfactory device. Again, restoration of lost privileges of membership in the case of financial default should be *ipso facto*, on payment of arrears, while, in the case of other defaults, the organ empowered to suspend should be given the right to restore the privileges after satisfying itself that the default has been rectified.

(iv) As constituent instruments are notoriously silent on the point relating to the position of a member-State which refuses to ratify an amendment moved in accordance with the stipulated procedure, it is submitted that this lacuna should be avoided in future constituent instruments. A State is certainly bound by the amending machinery of a constituent instrument, but, if there is no limitation on withdrawal, in actual effect the binding force loses its effectiveness. If a member-State can legally withdraw at will without assigning reasons, it can certainly withdraw for non-ratification and give any other reason or no reason at all for doing so. Thus in every constituent instrument which provides for the machinery of amendment, a clear stipulation as to the position of a non-ratifying member must always be made with special reference to withdrawal.

Eradication of Chinese Precedent

The greatest insecurity that a member-State of an international organisation can feel is the prospect of its being denied representation for reasons not explained to it. As States and not their Governments are members of international bodies, denial of representation is unwarranted on the mere ground of its political complexion, or past record, or possible conduct in future. The State continuing its membership despite a change in Government is entitled to send its representatives, but subject always to appropriate action being taken against it for its violations of international law. No one can legally deny the right to take enforcement action against China for her illegal conduct, if any, but to deny her the right of sending a representative to an organisation of which she is a member is itself a breach of the rules of international law committed by the organisation or by its members collectively. If this lapse on the part of the Organisation is based on an application of the principles of recognition observed

by States in their individual intercourse, it is of the utmost urgency to differentiate between recognition of a government by an international organisation and recognition by its individual members. One need not object to individual States introducing the element of "like and dislike" in their practice of granting recognition to other States and their Governments, but there must be a clear objective impartial standard like the one furnished by the test of "effectiveness" established for recognition of a Government of a member-State by an international organisation, as the latter has to function as an institution established not merely for the well-being of nationals of an individual State but for the betterment of mankind as a whole. It has already been pointed out at length in Chapter 9 how essential it is, not only for the steady growth and development of international organisations, but also for their effective functioning, to follow the statutory rule of admitting representatives of the Government of a member-State on the principle of "effectiveness" irrespective of other considerations. Having granted admission, there could be no objection to any appropriate action being taken against it which would be justified on the merits. As the Chinese precedent confuses issues and produces insecurity among members of international organisations it should be eradicated and a clearly defined principle of recognition, leaving no room for ambiguity both from the viewpoint of law and fact, should be accepted by member-States for the specific purpose of international organisations.

As all international organisations can live and function only in accordance with the ability and willingness of the member-States that compose it, the multifarious safeguards of a constituent instrument can never present a proper solution to a problem which requires a change of heart for the effective introduction of the rule of law in the international community. That change, in a society of sovereign international persons, must inevitably be slow and evolutionary, dictated by the force of events which may compel national States to accept limitations to their sovereignty so essential for the effective functioning of organisations, which alone can establish an international régime, with *lex* as *rex*. It should be a universal aim to hasten this process: a duty resting upon each member of the United Nations. To this ideal I dedicate this work.

APPENDIX 1

Extracts from International Instruments

THE COVENANT OF THE LEAGUE OF NATIONS

Article 1 (3)

"Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal."

Article 16 (*Sanctions of the League*)

"(4) Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon."

Article 26 (*Amendments*)

* "(1) Amendments to this Covenant will take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of Members of the League whose Representatives compose the Assembly."

"(2) No such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League."

* "When sufficient ratifications have been received this Article will read: Amendments to the present Covenant the text of which shall have been voted by the Assembly on a three-fourths majority, in which there shall be included the votes of all the Members of the Council represented at the meeting, will take effect when ratified by the Members of the League whose Representatives composed the Council when the vote was taken and by the majority of those whose Representatives form the Assembly.

"If the required number of ratifications shall not have been obtained within twenty-two months after the vote of the Assembly, the proposed amendment shall remain without effect.

"The Secretary-General shall inform the Members of the taking effect of an amendment.

"Any Member of the League which has not at that time ratified the amendment is free to notify the Secretary-General within a year of its refusal to accept it, but in that case it shall cease to be a Member of the League."

APPENDIX 2

THE UNITED NATIONS CHARTER AND ITS SPECIALISED AGENCIES

CHAPTER II—MEMBERSHIP

Article 5

"A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council."

Article 6

"A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organisation by the General Assembly upon the recommendation of the Security Council."

Article 19

"A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organisation shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member."

Article 108

"Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council."

FOOD AND AGRICULTURAL ORGANISATION

Article XVIII (*Withdrawal*)

"Any Member-nation may give notice of withdrawal from the Organisation at any time after the expiration of four years from the date of its acceptance of this Constitution. Such notice shall

take effect one year after the date of its communication to the Director General. The financial obligation to the Organisation of a Member-nation which has given notice of withdrawal shall include the entire financial year in which the notice takes effect."

Article XIX (*Amendment of the Constitution*)

"1. The Conference may amend this Constitution by a two-thirds majority of the votes cast, provided that such majority is more than one half of the membership of the Organisation.

"2. An amendment not involving new obligations for member-Nations shall take effect forthwith, unless the Resolution by which it is adopted provides otherwise. Amendments involving new obligations shall take effect for each member-Nation accepting the amendment on acceptance by two-thirds of the membership of the Organisation, and thereafter for each remaining member-Nation on acceptance of it."

THE INTERNATIONAL CIVIL AVIATION ORGANISATION

Article 62 (*Suspension of voting power*)

"The Assembly may suspend the voting power in the Assembly and in the Council of any contracting State that fails to discharge within a reasonable period its financial obligations to the Organisation." [1]

Article 88 (*Penalty for non-conformity by State*)

"The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter."

Article 94 (*Amendment of Convention*)

"(a) Any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly, and shall then come into force in respect of States which have ratified such amendment, when ratified by the number of contracting States specified by the Assembly. The number so specified shall not be less than two-thirds of the total number of contracting States.

"(b) If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organisation and a party to the Convention.

[1] See Action of the Council, 17th Session, Document 7353 C/856 1953 for recommended action in the case of Jordan.

" (c) Denunciation shall take effect one year from the date of receipt of the notification and shall operate only as regards the State effecting the denunciation."

Article 95 (*Denunciation of Convention*)

(a) Any contracting State may give notice of denunciation of this Convention three years after its coming into effect, by notification addressed to the Government of the United States of America, which shall at once inform each of the contracting States.

THE INTERNATIONAL LABOUR ORGANISATION

Article 1

" 5. No Member of the International Labour Organisation may withdraw from the Organisation without giving notice of its intention so to do to the Director-General of the International Labour Office. Such notice shall take effect two years after the date of its reception by the Director-General, subject to the Member having at that time fulfilled all financial obligations arising out of its membership. When a Member has ratified any international labour Convention, such withdrawal shall not affect the continued validity for the period provided for in the Convention of all obligations arising thereunder or relating thereto."

Article 18

" 4. A Member of the Organisation which is in arrears in the payment of its financial contribution to the Organisation shall have no vote in the Conference, in the Governing Body, in any Committee, or in the elections of members of the Governing Body, if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years; Provided that the Conference may by a two-thirds majority of the votes cast by the delegates present permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member."

Article 36

" Amendments to this Constitution which are adopted by the Conference by a majority of two-thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two-thirds of the Members of the Organisation including five of the eight Members which are represented on the Governing Body as Members of chief industrial importance in accordance with the provisions of paragraph 3 of Article 7 of this Constitution."

THE INTERNATIONAL MONETARY FUND

Article XV (Withdrawal from Membership)

" Section 1. Right of members to withdraw.—Any member may withdraw from the Fund at any time by transmitting a notice in writing to the Fund at its principal office. Withdrawal shall become effective on the date such notice is received.

" Section 2. Compulsory withdrawal.—(a) If a member fails to fulfil any obligations under this Agreement, the Fund may declare the member ineligible to use the resources of the Fund. Nothing in this Section shall be deemed to limit the provisions of Article IV, Section 6, Article V, Section 5, or Article VI, Section 1.

" (b) If, after the expiration of a reasonable period, the member persists in its failure to fulfil any of its obligations under this Agreement, or a difference between a member and the Fund under Article IV, Section 6, continues, that member may be required to withdraw from membership in the Fund by a decision of the Board of Governors carried by a majority of the total voting power.

" (c) Regulations shall be adopted to ensure that before action is taken against any member under (a) or (b) above, the member shall be informed in reasonable time of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing."

Article XVII (Amendments)

" (a) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a governor or the Executive Directors, shall be communicated to the chairman of the Board of Governors who shall bring the proposal before the Board. If the proposed amendment is approved by the Board the Fund shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having four-fifths of the total voting power, have accepted the proposed amendment, the Fund shall certify the fact by a formal communication addressed to all members.

" (b) Notwithstanding (a) above, acceptance by all members is required in the case of any amendment modifying

(i) the right to withdraw from the Fund (Article XV, Section 1);

(ii) the provision that no change in a member's quota shall be made without its consent (Article III, Section 2);

(iii) the provision that no change may be made in the par value of a member's currency except on the proposal of that member (Article IV, Section 5 (b)).

" (c) Amendments shall enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram."

By-laws—Rules and Regulations

" Section 22. Compulsory Withdrawal

" Before any member is required to withdraw from membership in the Fund, the matter shall be considered by the Executive Directors who shall inform the member in reasonable time of the complaint against it and allow the member an adequate opportunity for stating its case both orally and in writing. The Executive Directors shall recommend to the Board of Governors the action they deem appropriate. The member shall be informed of the recommendation and the date on which its case will be considered by the Board and shall be given a reasonable time within which to present its case to the Board both orally and in writing. Any member so electing may waive this provision. [Adopted March 16, 1946.] "

THE INTERNATIONAL BANK

Article VI (Withdrawal and Suspension of Membership: Suspension of Operations)

Section 1. Right of members to withdraw

" Any member may withdraw from the Bank at any time by transmitting a notice in writing to the Bank at its principal office. Withdrawal shall become effective on the date such notice is received."

Section 2. Suspension of membership

" If a member fails to fulfil any of its obligations to the Bank, the Bank may suspend its membership by decision of a majority of the Governors, exercising a majority of the total voting power. The member so suspended shall automatically cease to be a member one year from the date of its suspension unless a decision is taken by the same majority to restore the member to good standing.

" While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except the right of withdrawal, but shall remain subject to all obligations."

Section 3. Cessation of membership in International Monetary Fund

" Any member which ceases to be a member of the International Monetary Fund shall automatically cease after three months to be a member of the Bank unless the Bank by three-fourths of the total voting power has agreed to allow it to remain a member."

Article VIII (Amendments)

" (a) Any proposal to introduce modifications in this Agreement, whether emanating from a member, a governor or the Executive Directors, shall be communicated to the Chairman of the Board of Governors, who shall bring the proposal before the Board. If the proposed amendment is approved by the Board the Bank shall, by circular letter or telegram, ask all members whether they accept the proposed amendment. When three-fifths of the members, having four-fifths of the total voting power, have accepted the proposed amendment, the Bank shall certify the fact by formal communication addressed to all members.

" (b) Notwithstanding (a) above, acceptance by all members is required in the case of any amendment modifying :

" (i) the right to withdraw from the Bank provided in Article VI, Section 1;

" (ii) the right secured by Article II, Section 3 (c);

" (iii) the limitation on liability provided in Article II, Section 6.

" (c) Amendments shall enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram."

BY-LAWS OF THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

Section 21. Suspension of Membership

" Before any member is suspended from membership in the Bank, the matter shall be considered by the Executive Directors who shall inform the member in reasonable time of the complaint against it and allow the member an adequate opportunity for stating its case both orally and in writing. The Executive Directors shall recommend to the Board of Governors the action they deem appropriate. The member shall be informed of the recommendation and the date on which its case will be considered by the Board and shall be given a reasonable time within which to present its case to the Board both orally and in writing. Any member so electing may waive this provision."

THE INTERNATIONAL REFUGEE ORGANISATION

Article 4 (Membership)

" 5. Members of the Organisation which are suspended from the exercise of the rights and privileges of membership of the United Nations shall, upon request of the latter, be suspended from the rights and privileges of this Organisation.

" 6. Members of the Organisation which are expelled from the United Nations shall automatically cease to be members of this Organisation.

" 7. With the approval of the General Assembly of the United Nations, members of the Organisation which are not members of the United Nations, and which have persistently violated the principles of the Charter of the United Nations, may be suspended from the rights and privileges of the Organisation or expelled from its membership by the General Council.

" 8. A member of the Organisation which has persistently violated the principles contained in the present Constitution may be suspended from the rights and privileges of the Organisation by the General Council, and, with the approval of the General Assembly of the United Nations, may be expelled from the Organisation.

* * *

" 10. Any member may at any time give written notice of withdrawal to the Chairman of the Executive Committee. Such notice shall take effect one year after the date of its receipt by the Chairman of the Executive Committee."

Article 10 (*Finance*)

" 5. A member of the Organisation which, after the expiration of a period of three months following the date of the coming into force of this Constitution, has not paid its financial contribution to the Organisation for the first financial year, shall have no vote in the General Council or the Executive Committee until such contribution has been paid."

Article 16 (*Amendment of Constitution*)

" Texts of proposed amendments to this Constitution shall be communicated by the Director-General to members at least three months in advance of their consideration by the General Council. Amendments shall come into effect when adopted by a two-thirds majority of the members of the General Council present and voting and accepted by two-thirds of the members in accordance with their respective constitutional processes, provided, however, that amendments involving new obligations for members shall come into force in respect of each member only on acceptance by it."

INTERNATIONAL TELECOMMUNICATION CONVENTION

Article 20 (*Denunciation of the Convention*)

" 1. Each Member and Associate Member which has ratified, or acceded to, this Convention shall have the right to denounce it by a notification addressed to the Secretary-General of the Union by diplomatic channel through the intermediary of the Government of the country of the seat of the Union. The Secretary-General shall advise the other Members and Associate Members thereof.

" 2. This denunciation shall take effect at the expiration of a period of one year from the date of the receipt of notification of it by the Secretary-General."

UNIVERSAL POSTAL CONVENTION

Article 10 (*Withdrawal from the Union*)

" 1. Each member-Country is free to withdraw from the Union by notice given through the diplomatic channel to the Government of the Swiss Confederation and by that Government to the Governments of the member-Countries.

" 2. Withdrawal from the Union becomes effective on the expiry of a period of one year from the day on which the notice is received by the Government of the Swiss Confederation."

Article 21 (*Withdrawal from participation in the Agreements*)

" Each member-Country is free to withdraw from participation in one or more of the Agreements, under the conditions laid down in Article 10."

THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANISATION

Article II (*Membership*)

" 4. Members of the Organisation which are suspended from the exercise of the rights and privileges of membership of the United Nations Organisation shall, upon the request of the latter, be suspended from the rights and privileges of this Organisation.

" 5. Members of the Organisation which are expelled from the United Nations Organisation shall automatically cease to be members of this Organisation.

" 6. Any member-State or Associate member of the organisation may withdraw from the Organisation by notice addressed to the Director-General. Such notice shall take effect on December 31 of the year following that during which the notice was given. No such withdrawal shall affect the financial obligations owed to the Organisation on the date the withdrawal takes effect. Notice of withdrawal by an associate member shall be given on its behalf by the member-State or other authority having responsibility for its international relations (Resolution II, 1. 1. 1954)."

Article IV

(Para. 8b) " A member-State which is in arrears in the payment of its financial contributions to the Organisation shall have no vote in the General Conference if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding full two years."

(Para. 8c) "The General Conference may nevertheless permit such a member-State to vote, if it is satisfied that the failure to pay is due to conditions beyond the control of the member-Nation." (Amendment to the Constitution adopted by the Conference at its fourth session.)

Article XIII (Amendments)

"1. Proposals for amendments to this Constitution shall become effective upon receiving the approval of the General Conference by a two-thirds majority; provided, however, that those amendments which involve fundamental alterations in the aims of the Organisation or new obligations for the member-States shall require subsequent acceptance on the part of two-thirds of the member-States before they come into force. The draft texts of proposed amendments shall be communicated by the Director-General to the member-States at least six months in advance of their consideration by the General Conference.

"2. The General Conference shall have power to adopt by a two-thirds majority rules of procedure for carrying out the provisions of this Article."

THE WORLD HEALTH ORGANISATION

Article 7

"If a Member fails to meet its financial obligations to the Organisation or in other exceptional circumstances the Health Assembly may, on such conditions as it thinks proper, suspend the voting privileges and services to which a Member is entitled. The Health Assembly shall have the authority to restore such voting privileges and services."

Article 73 (Amendments)

"Texts of proposed amendments to this Constitution shall be communicated by the Director-General to Members at least six months in advance of their consideration by the Health Assembly. Amendments shall come into force for all Members when adopted by a two-thirds vote of the Health Assembly and accepted by two-thirds of the Members in accordance with their respective constitutional processes."

WORLD METEOROLOGICAL ORGANISATION

Part XVII *(Withdrawal)*

Article 30

"(a) Any Member may withdraw from the Organisation on twelve months' notice in writing given by it to the Secretary-General of the Organisation, who shall at once inform all the Members of the Organisation of such notice of withdrawal.

" (b) Any Member of the Organisation not responsible for its own international relations may be withdrawn from the Organisation on twelve months' notice in writing given by the Member or other authority responsible for its international relations to the Secretary-General of the Organisation, who shall at once inform all the Members of the Organisation of such notice of withdrawal."

Part XVIII (*Suspension*)

Article 31

" If any Member fails to meet its financial obligations to the Organisation or otherwise fails in its obligations under the present Convention, the Congress may by resolution suspend it from exercising its rights and enjoying privileges as a Member of the Organisation until it has met such financial or other obligations."

Part XV (*Amendments*)

Article 28

" (a) The text of any proposed amendment to the present Convention shall be communicated by the Secretary-General to Members of the Organisation at least six months in advance of its consideration by the Congress.

" (b) Amendments to the present Convention involving new obligations for Members shall require approval by the Congress, in accordance with the provisions of Article 10 of the present Convention, by a two-thirds majority vote, and shall come into force on acceptance by two-thirds of the Members which are States for each such Member accepting the amendment and thereafter for each remaining such Member on acceptance by it. Such amendments shall come into force for any Member not responsible for its own international relations upon the acceptance on behalf of such a Member by the Member responsible for the conduct of its international relations.

"(c) Other amendments shall come into force upon approval by two-thirds of the Members which are States."

ANZUS

AUSTRALIA—NEW ZEALAND—THE UNITED STATES OF AMERICA

Article X

" This Treaty shall remain in force indefinitely. Any Party may cease to be a member of the Council established by Article VII one year after notice has been given to the Government of Australia which will inform the Governments of the other Parties of the deposit of such notice."

ANGLO-SOVIET ALLIANCE. 1942

Treaty of Alliance in the War against Hitlerite Germany and Her Associates in Europe and of Collaboration and Mutual Assistance Thereafter concluded between the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland.

Article VIII

"Part II of the present Treaty shall remain in force for a period of twenty years. Thereafter, unless twelve months' notice has been given by either Party to terminate the Treaty at the end of the said period of twenty years, it shall continue in force until twelve months after either High Contracting Party shall have given notice to the other in writing of his intention to terminate it."

BRUSSELS TREATY

Article XII

"The present Treaty shall be ratified and the instruments of ratification shall be deposited as soon as possible with the Belgian Government.

"It shall enter into force on the date of the deposit of the last instrument of ratification and shall thereafter remain in force for fifty years.

"After the expiry of the period of fifty years, each of the High Contracting Parties shall have the right to cease to be a party thereto provided that he shall have previously given one year's notice of denunciation to the Belgian Government.

"The Belgian Government shall inform the Governments of the other High Contracting Parties of the deposit of each instrument of ratification and of each notice of denunciation." [2]

CHARTER OF THE ORGANISATION OF AMERICAN STATES

Article 112

"The present Charter shall remain in force indefinitely, but may be denounced by any Member-State upon written notification to the Pan-American Union, which shall communicate to all the others each notice of denunciation received. After two years from the date on which the Pan-American Union receives a notice of denunciation, the present Charter shall cease to be in force with

[2] Formerly Article 10; parties to the Treaty are the United Kingdom, Belgium, France, Federal Republic of Germany, Italy, Luxembourg and the Netherlands. The Protocol entered into force on May 5, 1955.

respect to the denouncing State, which shall cease to belong to the Organisation after it has fulfilled the obligations arising from the present Charter."

DUNKIRK TREATY

Article VI

" (2) It will come into force immediately on the exchange of the instruments of ratification and will remain in force for a period of fifty years.

" (3) Unless either of the High Contracting Parties gives to the other notice in writing to terminate it at least one year before the expiration of this period, it will remain in force without any specified time limit, subject to the right of either of the High Contracting Parties to terminate it by giving to the other in writing a year's notice of his intention to do so."

INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE

Article 25

" This Treaty shall remain in force indefinitely, but may be denounced by any High Contracting Party by a notification in writing to the Pan-American Union, which shall inform all the other High Contracting Parties of each notification of denunciation received. After the expiration of two years from the date of the receipt by the Pan-American Union of a notification of denunciation by any High Contracting Party, the present Treaty shall cease to be in force with respect to such State, but shall remain in full force and effect with respect to all the other High Contracting Parties."

NORTH ATLANTIC TREATY

Article 12

" After the Treaty has been in force for ten years, or at any time thereafter, the Parties shall, if any of them so requests, consult together for the purpose of reviewing the Treaty, having regard for the factors then affecting peace and security in the North Atlantic area, including the development of universal as well as regional arrangements under the Charter of the United Nations for the maintenance of international peace and security."

Article 13

" After the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation."

TRAITÉ INSTITUANT LA COMMUNAUTÉ EUROPÉENNE DE DÉFENSE [3]

Article 128

" Le present Traité est conclu pour une durée de cinquante années à dater de son entrée en vigueur.

" Si, avant la réalisation d'une Fédération ou Confédération Européenne, le Traité de l'Atlantique Nord cessait d'être en vigueur ou la composition de l'Organisation du Traité de l'Atlantique Nord subissait une modification essentielle, les Hautes Parties Contractantes examineraient en commun la situation nouvelle ainsi créée."

(Translation)

" The present Treaty is concluded for a period of 50 years with effect from the date of its coming into force.

" If, before the materialisation of a European Federation or Confederation, the North Atlantic Treaty ceased to be in force or the composition of the North Atlantic Treaty Organisation underwent an essential modification, the High Contracting Parties would mutually examine the new situation thus created."

THE BENELUX CUSTOMS CONVENTION

Article 8

" The present Agreement shall be ratified and shall come into force on the first day of the third month after the exchange of the instruments of ratification.

" It may be terminated at any time, subject to one year's notice.

" It shall in any event cease to be effective on the coming into force of the long-term economic union which the contracting parties propose to conclude."

STATUTE OF THE COUNCIL OF EUROPE

Article 7

" Any Member of the Council of Europe may withdraw by formally notifying the Secretary-General of its intention to do so. Such withdrawal shall take effect at the end of the financial year in which it is notified, if the notification is given during the first nine months of that financial year. If the notification is given in the last three months of the financial year, it shall take effect at the end of the next financial year."

Article 8

" Any Member of the Council of Europe, which has seriously violated Article 3, may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw

[3] This Article is from the Draft of a Treaty which has not yet been ratified.

under Article 7. If such Member does not comply with this request, the Committee may decide that it has ceased to be a Member of the Council as from such date as the Committee may determine."

Article 9

" The Committee of Ministers may suspend the right of representation on the Committee and on the Consultative Assembly of a member, which has failed to fulfil its financial obligation, during such period as the obligation remains unfulfilled."

Article 41 (*Amendments*)

" (a) Proposals for the amendment of this Statute may be made in the Committee of Ministers or, in the conditions provided for in Article 23, in the Consultative Assembly.

" (b) The Committee shall recommend and cause to be embodied in a Protocol those amendments which it considers to be desirable.

" (c) An amending Protocol shall come into force when it has been signed and ratified on behalf of two-thirds of the members.

" (d) Notwithstanding the provisions of the preceding paragraphs of this Article, amendments to Articles 23–35, 38 and 39 which have been approved by the Committee and by the Assembly shall come into force on the date of the certificate of the Secretary-General, transmitted to the Governments of Members, certifying that they have been so approved. This paragraph shall not operate until the conclusion of the second ordinary session of the Assembly."

EUROPEAN CULTURAL CONVENTION

Article 11

" 1. Any contracting party may denounce the present Convention at any time after it has been in force for a period of 5 years by means of a notification in writing, addressed to the Secretary-General to the Council of Europe, who shall inform the other contracting parties.

" 2. Such denunciation shall take effect for the contracting party concerned six months after the date on which it is received by the Secretary-General of the Council of Europe."

TREATY CONSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY

Article 12

" In addition to the provisions for regular redesignation, the terms of office of a member of the High Authority may be terminated by death or resignation.

" Members who no longer fulfil the conditions necessary to the exercise of their functions or who have committed a gross fault may be removed from office by the Court on petition by the High Authority or the Council.

" In the cases provided in the present Article, the member in question shall be replaced for the remainder of his term, under the provisions of Article 10. There shall be no such replacement if the remainder of his term is less than three months."

Article 96

" Following the expiration of the transition period, the Government of each member-State and the High Authority may propose amendments to the present Treaty. Such proposals will be submitted to the Council. If the Council, acting by a two-thirds majority, approves a conference of representatives of the Governments of the member-States, such a conference shall be immediately convoked by the President of the Council, with a view to agreeing on any modifications to be made in the provisions of the Treaty.

" Such amendments will enter into force after having been ratified by all of the member-States in conformity with their respective constitutional rules."

Article 97

" The present Treaty is concluded for a period of fifty years from the date of its entry into force."

CONVENTION FOR EUROPEAN ECONOMIC CO-OPERATION, TOGETHER WITH THE RESOLUTIONS TRANSMITTED TO THE COUNCIL BY THE COMMITTEE OF EUROPEAN ECONOMIC CO-OPERATION

Article 26 (*Non-Fulfilment of Obligations*)

" If any Member of the Organisation ceases to fulfil its obligations under the present Convention, it shall be invited to conform to the provisions of the Convention. If the said Member should not so conform within the period indicated in the invitation, the other Members may decide, by mutual agreement, to continue their co-operation within the Organisation without that Member."

Article 27 (*Withdrawal*)

" Any of the Contracting Parties may terminate the application of the present Convention to itself by giving twelve months' notice to that effect to the Government of the French Republic."

ANGLO-AMERICAN ECONOMIC CO-OPERATION AGREEMENT

Article XIII

" (2) If, during the life of this Agreement, either Government should consider there has been a fundamental change in the basic assumptions underlying the Agreement, it shall so notify the other Government in writing and the two Governments will thereupon consult with a view to agreeing upon the amendment, modification or termination of the Agreement. If, after three months from such notification, the two Governments have not agreed upon the action to be taken in the circumstances, either Government may give notice in writing to the other of intention to terminate the Agreement. Subject to the provisions of paragraph 3 of this Article, the Agreement shall then terminate either—

(a) Six months after the date of such notice of intention to terminate, or

(b) After such shorter period as may be agreed to be sufficient to ensure that the obligations of the Government of the United Kingdom are performed in respect of any assistance which may continue to be furnished by the Government of the United States of America after the date of such notice;

provided, however, that Article V and paragraph 3 of Article VII shall remain in effect until two years after the date of such notice of intention to terminate, but not later than June 30, 1953.

" (3) Subsidiary agreements and arrangements negotiated pursuant to this Agreement may remain in force beyond the date of termination of the Agreement and the period of effectiveness of such subsidiary agreements and arrangements shall be governed by their own terms. Article IV shall remain in effect until all the sums in pounds sterling required to be deposited in accordance with its terms have been disposed of as provided in that Article. Paragraph 2 of Article III shall remain in effect for so long as the guarantee payments referred to in that Article may be made by the Government of the United States of America.

" (4) This Agreement may be amended at any time by agreement between the two Governments."

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[*Page numbers in* **heavy type** *indicate text of Articles reproduced in Appendix.*]